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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

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PART I.

CIVIL RULINGS.

Miscellaneous Appeal from Dinagepore.

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12th September.
CIVIL JURISDICTION.
CASE 386 OF 1867.

Modhoomutty Dabea, (Decree-holder) *Petitioner, versus* Khummunkerry Dabea and others, (Judgment-debtors) *Opposite Party.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboo Otool Chunder Mookerjee for Petitioner.
Baboos Onoocool Chunder Mookerjee and *Sreenath Dass* for Opposite Party.

Jackson, J.—This is a decree-holder's appeal.

The measure of damages to be recovered as mesne profits is not what defendant has gained, but what plaintiff has lost. Where plaintiff recovered his land from the zemindar who had dispossessed him, *held*, that the zemindar was not entitled to deduct from mesne profits the rent which plaintiff would have paid had he remained undisturbed.

The plaintiff's vendor held a jote of some 53 beegahs of land, and was dispossessed by the defendant, the zemindar. He obtained a decree for the recovery of his land with wasilat. It became a question whether the defendant, after dispossessing plaintiff, had cultivated the lands herself, or had let them to ryots; and whether, in either case, the plaintiff was entitled to recover the profits of cultivation or the rent. In one stage of the proceedings, the case came before a Bench of this Court, and the Court remanded it for enquiry, observing that the principle was, that if the defendant had personally cultivated the land, she was liable to account for the profits of cultivation; but if the land had been let to tenants, then she was to account for the rents received. But as the fact was not clear, the Court below was ordered to enquire whether the land had been cultivated by the defendant, or let to tenants. The Lower Court has now found that the land was let at an annual rent of Rupees 72, and has accordingly awarded to plaintiff wasilat at that rate, less the amount which the plaintiff would have paid as rent to the landlord, which is Rupees 71; the result of this being that the plaintiff has had awarded as wasilat for the period of twelve years on the jote a sum of about Rupees 17.

This is a decision which we could not have affirmed, or any portion of it, but for the order of remand made by this Court. The principle on which the remand order was passed is, I think, at variance with the principle lately adopted and declared by the Full Bench; namely, the principle that the measure of the damages to be recovered by the plaintiff is not that which the defendant has gained, but that which the plaintiff has lost in consequence of the defendant's wrongful act; and if the matter were open to us now to make a proper order in this case, irrespective of former proceedings, I have no doubt that we should direct the Court below to award to the plaintiff the whole profits

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which the plaintiff, if he had been left in peaceable possession of his land, would have realized. But the order of remand from this Court went upon a different principle. No application has been made to review that order, and consequently we are unable to disturb it. Therefore we have no choice but to declare the plaintiff entitled to wasilat at the rate of Rupees 72 per annum.

The question remains, whether, under such circumstances, the Courts below were authorized in making a deduction from that amount of wasilat at the rate which would have been paid by the plaintiff to defendant, if the plaintiff had been left in possession of his land? Now, upon that I have to observe that the plaintiff would have paid this rent to defendant, not out of the sum of Rupees 72 per annum, but out of the gross profits of cultivation, which, if he had been left in possession, he would have derived. I think it is by no means an invariable rule that a person in wrongful possession of land that did not belong to him, in accounting to the rightful owner for the mesne profits, is entitled to a deduction of everything which he has paid in connexion with his occupation of the land. There may be cases, and there will frequently be cases, in which he will not be entitled to such deduction.

In this case it seems to me perfectly clear that the defendant is not entitled to a deduction of the rent which the plaintiff would have paid her. The state of things upon which such rent would have been paid has been reversed, the plaintiff has been deprived of his legitimate and reasonable profits, and he has not received into his hands those funds out of which he would have paid the defendant that rent, and therefore I think he cannot be called upon to suffer a deduction of that rent.

I think, therefore, that the Courts below, if they were bound by the order of remand, allowing the plaintiff no more than the bare rent which the defendant had received, ought to have executed that order literally, and not to have qualified it by any deduction whatsoever. I think, therefore, that the order passed after remand must be amended, and that the plaintiff will be entitled to receive wasilat at the rate of 72 Rupees 11 annas and 13 gundahs per annum, with interest, without deduction of any kind whatsoever.

Each party will pay his own costs.

Hobhouse, J.—I concur.

CASE 607 OF 1867.

20th September.

Special Appeal from Bhaugulpore.

Rampurshad Singh and others, (Plaintiffs) *Appellants, versus* Ram Lall Sing, (Defendant) *Respondent.*

Before *Glover* and *Hobhouse*, J. J.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellants.
Mr. C. Gregory and *Baboo Kishen Succa Mookerjee* for Respondent.

Where plaintiff pleaded that, at the time he foreclosed his mortgage, defendant was a tenant of the mortgagor, and that after foreclosure the defendant was not justified in paying rent to the zemindar, and should account for it now to plaintiff as mesne profits, *held*, that the mere fact of defendant's payments continuing to be made to his former landlord, the mortgagor, would not render defendant liable for wasilat,

Glover, J.—The plaintiff in this suit (a mortgagee under a deed of conditional sale, who had succeeded in a suit for foreclosure) sued his mortgagors and a tenant, one Manha Singh, for possession and mesne profits.

This Manha Singh, the only party with whom we have to do in this special appeal, pleaded that he held the lands under a "theeka" lease from the proprietors, extending from 1255, B. S, to 1274, B. S., and had paid his rent to them. He denied that he was in any way liable for mesne profits.

The Court of first instance gave plaintiff a decree, but on appeal the Judge held that, as Manha Singh had paid rent to the proprietors, and had received no part of the profits of the estate, he was not liable for "wasilat."

It is urged in special appeal that the defendant, Manha Singh, having notice of the foreclosure, was not justified in continuing to pay rent to his original landlords, and that there is no proof that he held a "theeka" lease at all.

On this last point, I think that the Judge has substantially found for the special respondent, and has held the "theeka" lease to be proved. This is a finding of fact with which there is no interference possible in special appeal.

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For the rest, I have no doubt that Manha Singh ought not to have been made a defendant in this case at all, and that, in his position as a ryot, he was not, and could not be, liable for wasilat.

As, however, he has been placed in that position, I think it right to give our opinion on the case as it stands.

It appears from the record that the foreclosure suit was brought in 1853. The present suit was not instituted till 1864; so that the plaintiff allowed no less than eleven years to pass without taking any steps to recover his property, or to publish to the world that he had taken the place of the former owners.

unless it were proved that he had knowledge and notice of the foreclosure, and after such knowledge continued to pay to the zemindar.

Supposing, therefore, for the sake of argument, that a suit for wasilat would lie against the special respondent, it would be for the special appellant to disclose a sufficient cause of action; in other words, to show very clearly that he issued notice on special respondent, his tenant, telling him that he had stepped into the shoes of the old proprietors, and forbidding him to pay rent to any one but himself.

Special appellant has not shown anywhere that this was his ground of action, or, indeed, that he ever issued notice, whilst the fact of his delaying no less than eleven years is a strong presumption the other way.

On the other hand, it is proved that the defendant, Manha Singh, has been himself in possession *bonâ fide*, as the Judge finds, and has, during the past nine years at least, paid his rent to those who gave him the lease, and whom he naturally looked to as his landlords. The special appellant has on the record nowhere ever hinted that the special respondent was cognizant of the altered state of affairs, and, under the circumstances of the case, it is extremely difficult to imagine that he could have known anything about the matter.

The special appeal, therefore, must be dismissed with costs.

Hobhouse, J.—I agree with my brother Glover that this special appeal must be dismissed with costs.

I think that, looking to the pleadings of special appellant in the Court of first instance, and to the finding of fact by the Lower Appellate Court mentioned by my brother Glover, it is sufficiently found that special respondent was a person who held the lands in dispute during the period in question as a tenant of the zemindar.

Then special appellant's contention is, that because special respondent was such tenant, and because he, special appellant, as the mortgagee, foreclosed during special respondent's tenancy, therefore special respondent was not justified in paying rent to the zemindar after foreclosure (1845), and up to suit (1864), and is liable to him, special appellant, for such rent in the shape of wasilat.

Had special appellant pleaded, and had he proved that special respondent held the land as tenant with knowledge and after notice of his (special appellant's) mortgage and foreclosure, and that special respondent having such knowledge, and after such notice, still continued to pay rents to the zemindar, the mortgagor, then I think there would have been a fair contention that special respondent was liable to special appellant for the wasilat in dispute.

But special appellant did not so plead; and it is therefore too late for him now to ask so to be allowed to plead, and, in remand, to prove that special respondent had such knowledge or notice, and without it, it is quite clear that special respondent cannot be held liable for the wasilat claimed.

Special Appeal from Bhaugulpore.

CASE 483 OF 1867.
19th November.

Baboo Mohesh Lall, (Plaintiff) *Appellant*, *versus* Mr. John Christian and others, (Defendants) *Respondents*.

Before *Bayley* and *Phear*, J. J.

Mr. Montriou and *Baboo Mohesh Chunder Chowdhry* for Appellant.
Mr. R. V. Doyne and *Baboo Kishen Succa Mookerjee* for Respondents.

Phear, J.—The plaintiff brings this suit against the vendor and the purchaser of a certain portion of land in the district of Bhaugulpore, seeking

The enforcement of the right of pre-

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emption by one of a class acknowledging such right against a Christian, on the ground that the said right obtains by custom in the particular zillah, must depend upon evidence showing that the Christians of the district have adopted the said custom.

to obtain possession of the said land, on the ground of an alleged right of pre-emption. Both the plaintiff and the vendor defendant are Hindoos, inhabitants of Behar, and, as such, members of a class which has adopted the custom of pre-emption; the purchaser defendant is a Christian. The land in question is now in possession of this latter defendant, and therefore the cardinal question in the case is whether or not the plaintiff has a right to recover the land as against him, he being a Christian inhabitant of Bhaugulpore. If the plaintiff has such a right, it must be because the Christian defendant, under the circumstances which are necessary to give foundation to a claim of right of pre-emption, is bound by law, or by custom having the force of law, to give up the land to the plaintiff at his request. Now, admittedly, there is no such general law, for the right of pre-emption is not matter of title to the property, but is rather a right to the benefit of a contract. Therefore, if the Christian defendant is so bound, it must be by reason of some custom to which a class only of the people, including him as a member, and not all people, are, on grounds of justice, equity, and good conscience, subject. No doubt, in reference to the obligation of a custom, the class subject to it may be defined either by local limits, or by family, social, or personal characteristics, and so on. Mr. Montriou's argument (throughout which I may remark he has treated this case entirely as if it were one of regular appeal) requires either that all inhabitants, or at least all Christian inhabitants, of the district of Bhaugulpore, dealing with Hindoos for the purchase of land within the same district, are bound by the Mahomedan rules with regard to pre-emption, or some modification of them. This is entirely a matter of evidence, in which the point to be established is that the persons of the necessary class have exhibited adherence to the custom alleged; and the Lower Court finds especially on the evidence before it, that Christians in Bhaugulpore are not shown to have adopted such a custom. It follows from this finding that all the inhabitants of Bhaugulpore have not adopted it. Hence the requisites necessary to satisfy the exigencies of Mr. Montriou's argument are not satisfied, and he must fail in the contention which he makes on behalf of his client. It appears to me, therefore, that, supposing we were in a position to deal with this case as a case of regular appeal, the application of the plaintiff ought to be dismissed.

But, in truth, this is a special appeal, complaining that the Lower Appellate Court has erred in carrying out the order of remand formerly made by this Court. As to this I need now only say that I think the objection has not been sustained by the argument. I am of opinion that the Lower Appellate Court substantially tried and determined the issues which were referred to it by remand order of this Court.

This special appeal must therefore be dismissed with costs.

Bayley, J.—I entirely concur, the current of decisions having been to the effect that where it is shown that the Hindoos of any district or province had adopted as a custom the system of pre-emption recognized by the Mahomedan law, that custom should be binding on such Hindoos. Acting on analogy to the principle laid down in those decisions, the remand order of this Court (of which this so-called special appeal is, in fact, an application for review) required the Lower Courts to find if the Christians of Bhaugulpore (as well as the Hindoos) had adopted the custom in question. It was on special appellant to prove this, and the Lower Appellate Court has found as a fact that he utterly failed to do so.

Under this state of facts, I think this special appeal should be rejected with costs.

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CASE 552 OF 1866.

Application for Review of Judgment in Regular Appeal No. 241 of 1864, dated 26th September, 1866.

Suddanund Mohapattur, (Plaintiff) *Appellant, Petitioner, versus* Mussamut Soorjmonee Dabee, (Defendant) *Respondent, Opposite Party.*

Before *Loch, L. S. Jackson,* and *Hobhouse,* J. J.

Mr. R. V. Doyne and *Baboos Onooccol Chunder Mookerjee, Mohendro Lall Shome,* and *Tarrucknath Sein* for Petitioner.

Mr. J. Cochrane and *Baboos Unnodapurshad Banerjee, Chunder Madhub Ghose,* and *Mohesh Chunder Chowdhry* for Opposite Party.

Hobhouse, J.—The material facts of this case are as follows:—

One Chucker Dhur Dass, the sole owner of a large family property governed by the Mitakshara doctrine, adopted two sons,—first, (in 1823), the plaintiff, appellant, Suddanund, and secondly, in 1825, one Bonomalee, now deceased, the husband of the principal defendant, respondent, Soorjmonee.

Then, on the 5th of April, 1849, Chucker Dhur made a will to this effect, *viz.*, he gave 9 annas of his ancestral and self-acquired immoveable property to Suddanund, and 7 annas to Bonomalee, and he divided his moveable property into equal shares between the two.

And the will went on to declare that the testator's property was, the will notwithstanding, to remain at his absolute disposal during his lifetime; and that if either of the sons disputed, or did anything contrary to it, then that son was to forfeit his share of the property devised, and the other son was to take the whole of it.

On the 7th May, 1857, Suddanund left his father's house, and on the 22nd May, 1857, he prayed the authorities for protection against his father's violence, and thereafter, on the 27th July, 1857, Chucker Dhur filed a petition in the Judge's Court, and another in the office of the Magistrate and Collector of the district, setting forth the will, alleging that Suddanund had forfeited the status of a son, declaring that, under the terms of the will, he had repudiated and disinherited Suddanund, and that Bonomalee was entitled to the whole property, moveable and immoveable, and praying the Court to take notice of the facts of such repudiation, and of Suddanund having no right to the estates covered by the will, and winding up by saying that he retained the power to dispose absolutely of all properties covered by the will, and of whatever properties he had acquired, or might hereafter acquire, (sewaee) "besides, or in addition to," the properties covered by the will.

Suddanund filed an answer to this petition, denying Chucker Dhur's right to deprive him of the status of a son, and therefore Chucker Dhur rejoined on the 17th January, 1858; and, after reciting his right to repudiate Suddanund, declared that he had done so, and had, under the terms of the will, constituted Bonomalee malik of the 16 annas.

Chucker Dhur presented this petition in person, and requested that it and the previous petition of July, 1859, might be filed in Court *with the will.*

On the 14th January, 1859, Suddanund filed a suit against Chucker Dhur and Bonomalee. In this he recited the family history and disputes up to the time of the petition of 17th January, 1858; he contested the right of Chucker Dhur to adopt the second son, Bonomalee, during his (Chucker Dhur's) lifetime; he alleged himself to be the sole heir of Chucker Dhur by right of adoption, and he prayed, *first,* that the will, and what he called the false and fraudulent petitions, might be set aside.

Secondly.—That Chucker Dhur's repudiation of himself, and adoption of Bonomalee, might be annulled; and

Thirdly.—That maintenance from 23rd May, 1857, the date of his dismissal from Chucker Dhur's mansion, to the date of Chucker Dhur's death, whenever that might occur, might be awarded to him.

A Hindoo living under Mitakshara law adopted two sons A and B, and devised his property to them by will in certain proportions. Afterwards, in consequence of A's bad conduct, he repudiated him, and declared that all the property under the will went to B.

A sued to have the adoption of B and his own repudiation set aside, and got a decree; the High Court ruling on appeal that A would take all the ancestral immoveable property as son, while B would have all that of which the testator could divest himself, including property self-acquired from income of ancestral property.

Held, in present suit by A for possession, that the former decision as to extent of B's rights was *ultra vires,* and not binding on the parties, and that a son under Mitakshara held equal rights with his father from date of adoption or birth. B could only take property self-acquired from the profits of ancestral property *before* A's *adoption.*

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On the 13th March, 1859, Chucker Dhur and Bonomalee replied, alleging the fact of the repudiation of Suddanund, and of the adoption of Bonomalee, and of the notification thereof to the Courts, and pleading justification for the same; and adding that the so-called self-acquired zemindaries were not acquired out of the profits of Chucker Dhur's ancestral estates, but were acquired by private means of Chucker Dhur, of a nature specified.

Suddanund rejoined to this that Chucker Dhur had acquired no estates out of private funds or otherwise than out of the profits of ancestral estates, but that he did not sue to recover any estates, but only to be declared the legal heir of Chucker Dhur, and to obtain maintenance.

The issues material to this case that were laid down were these:—

Firstly.—Could Chucker Dhur repudiate Suddanund?

Secondly.—Was the will admitted by plaintiff?

Thirdly.—Could Chucker Dhur, and did he adopt Bonomalee, and could two sons be adopted?

Fourthly.—Was Suddanund entitled to maintenance?

The Court of first instance held on the first issue that Chucker Dhur's repudiation of Suddanund was valid in law; on the second issue, that the will was consented to; and was just and proper; and on the third issue, that Chucker Dhur had power to adopt two sons; and the Court then, on the 6th of March, 1860, dismissed Suddanund's suit.

An appeal was made to the High Court, and pending the hearing of this, *viz*, on the 17th August, 1861, Chucker Dhur died, and the appeal proceeded between Suddanund and Bonomalee.

Justices Campbell and Pundit, page 317, Marshall.

In appeal, Chucker Dhur having died in the interim, the question of maintenance was dropped; and on the 28th February, 1863, a Division Bench of this Court decided the appeal as follows:—

They held, on the questions material to this appeal, *first*, that the adoption of Bonomalee was void; *secondly*, that Suddanund was entitled to the status of a son, "declarations published by the father, whereby he cast off the son, and professed to deprive him of that status being illegal;" *thirdly*, that the will and the petitions were inofficious and inoperative, so far as they professed to deprive Suddanund of his right to succeed to "the whole ancestral immoveable property held" by Chucker Dhur, but not "as regards all other property;" and, lastly, that by ancestral immoveable property was meant "only that actually inherited from ancestors, and not that which had been acquired or recovered, even though it might have been acquired from the income of ancestral property."

On the 23rd November, 1863, Suddanund brought the suit now in regular appeal before us.

In the plaint, Suddanund sets forth certain moveable and immoveable properties, alleging that these are all his by ancestral right; that his title to possession thereof accrued on the death of his father Chucker Dhur in August, 1861; and that Bonomalee, up to the time when he died, in October, 1863, had been keeping him out of possession; so that, in right of inheritance, he claimed possession of the immoveable properties with mesne profits, and of the moveable properties, or their value.

On comparing this plaint with Suddanund's written statement, it is clear that he intended to claim, and did claim, as heir-at-law to Chucker Dhur, the whole of the properties left by Chucker Dhur, except the 7 annas of the self-acquired immoveable property, (whether that property was acquired out of the profits of ancestral property or otherwise) and the 8 annas of the moveable property specified in the will.

The defendant filed a schedule of the ancestral immoveable property, to which she admitted that Suddanund was entitled, but claimed the rest of the property in suit as having been conveyed to her late husband Bonomalee under the will of Chucker Dhur, as interpreted, she maintained, by the High Court in its decision of 1863.

The issues material to this appeal, laid down by the Court below, were:—

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First.—Of the properties in dispute, which are the ancestral, and which the self-acquired, properties of Chucker Dhur? and

Secondly.—Whether or not the plaintiff is entitled to the properties, real and personal, acquired by Chucker Dhur?

On these issues, the Court below seems to have held, partly on the strength of the High Court's decision of 1863, and partly on its own view of the evidence on record, that Bonomalee was entitled, under devise from Chucker Dhur, to the whole of the self-acquired immoveable property, and to the whole of the moveable property of Chucker Dhur; and then the Court went on to determine what was the self-acquired, and what was the ancestral immoveable property of Chucker Dhur, and decreed possession of this latter property only to Suddanund, appellant before this Court.

There is no appeal before this Court in the matter of the moveable property; but in the matter of the immoveable property, it is contended that the appellant is entitled to the whole of it, less only the 7 annas of self-acquired immoveable property covered by the will of Chucker Dhur.

Mr. Cochrane, for respondent, contends that this point has already been determined, adversely to appellant, by the decision of the Division Bench of this Court of the 28th February, 1863

The words used by the Division Bench are these:—"We declare that the will and the petitions sought to be set aside are inofficious and inoperative, so far as they profess to deprive the plaintiff (Suddanund) of his right to succeed to the whole ancestral immoveable property held by Chucker Dass (Chucker Dhur). But as regards all other property, seeing that Chucker Dass was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the plaintiff."

There cannot, I think, be any doubt but that the effect of these words was to find that Suddanund was entitled to nothing more than *the whole ancestral immoveable property* held by Chucker Dhur; but Mr. Doyne, for appellant, contends that this finding was *ultra vires*, and that his client is entitled now to a decision of this Court on the effect of the will and the petition.

I think that this contention is sound. I observe that the real object of the suit of 1859 was not to declare how far the will and the petitions were officious and operative, but only to declare that Suddanund had the status of an only son; that the will and the petitions setting up another son, Bonomolee, did not affect that status; and that Suddanund, having such status, was entitled to maintenance during his father's lifetime.

These were clearly the only points put in issue; and these, looking to the Court's remarks at page 319 of their judgment, were at one time so considered to be the only points in issue; and when the Court went further and determined how far the will and petitions were officious and operative, and how far they were not, it determined a matter which was not legitimately before it, and on that matter, therefore, appellant is entitled, I think, to the judgment of this Court.

The question, then, before us seems to be, *first*, whether the will stands alone, or is to be read by the light of the petitions and the acts of Chucker Dhur; and, *secondly*, whether, if the will be so read, the whole of Chucker Dhur's self-acquired property was or was not conveyed by him to Bonomalee.

In this country there are no formalities to be gone through in order to the constitution of a valid will; and all that is required is, that the intention of the testator should be ascertained, in whatever way it may be ascertained, whether by word of mouth, or in writing, clearly and unmistakeably.

And in this case there cannot, I think, be a doubt of the intention of the testator.

He begins by adopting Suddanund, and then he adopts Bonomalee. He believes that they are both legally his sons. He divides his property in very nearly equal proportions between them, giving a little more, as was natural, to the first adopted. But his whole anxiety is, that what property he had to devise should remain unmistakeably, and without contest, with the person or

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persons of his election. Therefore, to make assurance doubly sure, as he thinks, he distinctly declares that he retains sole disposal of the property during his lifetime; and that if either of his sons should dispute this his particular distribution of it, then that son should forfeit his share, and the 16 annas of the estate should go to the other son.

Then exactly that contingency occurred which the testator had contemplated. Suddanund, the first adopted son, disputed his father's disposition of the property; and this being so, the father, in July, 1857, called upon the Courts to take notice that, in the terms of his will, (*i. e.*, his intention,) he had disinherited and disowned Suddanund, and that Suddanund had no title to his estates.

And again, in January, 1858, Chucker Dhur still more publicly notified the same intention, stating that Suddanund had forfeited his rights, and that he, Chucker Dhur, had confirmed Bonomalee; and that there might be no doubt of his intention, Chucker Dhur himself appeared before the Court with this last petition in the most public and solemn manner, and prayed that it and the petition of July, 1857, might be filed with his will, and they were accordingly so filed.

And, finally, in his reply of the 13th March, 1859, to the suit then instituted by Suddanund to set aside the will, Chucker Dhur distinctly talks of Bonomalee as the person who, after his decease, would be owner and heir of everything.

No doubt, in the petitions, Chucker Dhur did retain to himself the sole power of disposing of his estates during his lifetime: but so he did in the will; but this was evidently by way of precaution only (and Suddanund's conduct after the will would have made him (Chucker Dhur) doubly cautious); and, at the most, this expression of the retention of the power of disposing of his property was mere surplusage; for, as a matter of fact, Chucker Dhur could, of course, at any time of his life, have made a fresh disposition of such property as he had it in his power to dispose of.

Reading, then, Chucker Dhur's will, his petitions, his acts, and his pleadings in Court together, I have no doubt that he did sufficiently express his intention, in the words of the learned Judges in the case of 1863, to deprive Suddanund "of all right to the property (I would add to any property he had), so far as he could deprive him, and to give it to Bonomalee."

I hold, then, that appellant is not entitled to any immoveable property of which Chucker Dhur could by will deprive him, *i. e.*, to any self-acquired immoveable property of Chucker Dhur, whether such was acquired before the execution of the will or after it.

Mr. Doyne then urges for the appellant that the principle upon which the Court below has determined what is self-acquired and what is ancestral immoveable property is erroneous, and contends that ancestral property is not alone that which is derived directly from ancestors, but also that which is acquired out of the proceeds of property derived from ancestors.

Mr. Cochrane, on the other hand, contends for the respondent that this point has been already determined by the Division Bench in 1863, at page 320 of their judgment.

No doubt this is so; but, for the reasons I have given above, I am of opinion that the judgment of 1863 was on this point also *ultra vires*, and that appellant is entitled to our judgment upon it.

The learned Judges in 1863 laid it down that, "by the Mitakshara law applicable to the case, the son had a vested right of inheritance in the ancestral immoveable property; but that, as the income was the property of the tenant for life," the ancestral property "was only that actually inherited from ancestors, and not that acquired or recovered from the income of the ancestral property."

With great respect, I think that there is in this very thesis a position which shows the thesis to be untenable; for if, as I hold to be truly the case, the son, under the Mitakshara doctrine, has, from the moment of his birth, a vested right in ancestral property, it seems to me to follow that the father has not

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that dominion over the income of ancestral property which the learned Judges would assign to him.

The true position of the Mitakshara son is that which has been conclusively assigned to him by the Full Bench Ruling of the 7th June, 1867, page 28 *et seq*, Wyman's Reporter, Volume IV.

Under that ruling, it seems to me that the Mitakshara son is entitled, equally with his father, as well to the profits of ancestral property as to the property itself from the moment (in this case) of his adoption; and so in his case, that is equally ancestral property which has been acquired out of the proceeds of such property with that actually inherited from ancestors.

It is on this principle that I would determine what is ancestral, and what is self-acquired property in this case; and inasmuch as the Court below has determined this point upon a different principle, and there is not on the record evidence sufficient to enable us to determine the point on what I think to be the right principle, I would remand, or rather as my brother Jackson suggests, refer the case for enquiry and determination on this point.

Loch, J.—I concur.

Jackson, J.—I concur in the view taken by my colleagues as to the effect to be given to the previous decision of this Court in Suddanund's case, reported in Marshall, page 317.

It is necessary to consider what the object and scope of the suit then before the Court were, and to hold the decision binding upon the parties, as far as it gave or withheld any relief actually sought, and no further.

When the suit was commenced, the father of Suddanund was living. He alleged himself to have adopted a second son, to have repudiated Suddanund, and made the second son so adopted his heir and successor.

Suddanund consequently sued to set aside such alleged repudiation, to have the pretended adoption declared invalid, and to obtain the maintenance which his father withheld; the so-called will and petitions were impeached as claiming a right on the father's part to do the acts complained of, and the Court was asked to decide as to the existence of such right.

The plaint did not call for possession of any portion of the father's property, nor did the view then taken of the Mitakshara law by the Courts of these provinces encourage any such claim in the lifetime of the father.

Nor could it have served any useful purpose to seek from a Court of Justice a consideration of the validity of testamentary dispositions which the testator might (as he emphatically declared) at any time defeat by acts of alienation in his lifetime, and which he might also change by a fresh will.

All questions as to the devolution of property in the father's hands was necessarily, and, in fact, postponed until the father's death.

The Court, in 1863, in the outset of the judgment, proposed to itself for decision the issues really raised; and if, following the arguments of Counsel, the Judges afterwards went on to decide issues not regularly raised in the suit, it seems to me that the parties were not thereby concluded, and that the plaintiff is entitled to ask us now for a decision upon the points which now for the first time there is real occasion to determine.

In my opinion, the points which so arise are two:—

First.—Did Chucker Dhur make any disposition of his property to take effect after his death; if so, how and when?

Secondly.—Whether, under such disposition, Bonomalee was entitled to retain possession of the whole of Chucker Dhur's self-acquired property.

It is clear to me that Chucker Dhur did, so far as he could, make such disposition of his property, and that his intentions are to be found in the so-called will which he deposited in the Judge's Court in 1849.

The petitions afterwards put in do not, in my view of them, carry any fresh bequest; they merely explain, confirm, and put in force those provisions of the "will" which were intended to take effect in the occurring of the contingency of either son acting in opposition to the wishes of the father.

The language of those petitions is not, as it seems to me, that of a man

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giving something beyond what he had already given, but rather that of one ratifying and emphasizing that gift.

It may be observed that Suddanund had not, in the first instance, brought himself within the express provisions of the will which declared him subject to deprivation in case of contravention of the father's wishes. He at first was merely charged with vicious and disrespectful conduct; and it was not until the filing of his counter-petition, setting the father's disposition at nought, that he was declared to have brought himself within the deprivative clauses, as well as within the general rules of Hindoo law applicable to the case of a son disavowing the authority of a father.

I read the two petitions, therefore, rather as throwing light on the construction of the will, and as indicating the intention of the testator to act upon certain provisions of it, than as modifying its terms, or conveying anything additional.

Now, as to the meaning of the will itself, there has been some discussion as to the inference to be drawn from the mention therein of certain properties by name.

The truth seems to me to be simply that Chucker Dhur, in making this "will," was not giving specified property to Bonomalee, and making Suddanund a residuary legatee. He was simply dividing the property between the two; and for convenience sake he annexed a schedule of that property as it then stood.

Nothing in that will prevented either Bonomalee or Suddanund from taking shares in property subsequently acquired; and, in fact, it may be gathered from the language of the petition that, but for the renunciation of Suddanund, they would have been intended by the testator to take such property, according to the shares defined.

From the will and petitions taken together, it may, I think, be collected that Chucker Dhur having adopted, as he thought lawfully, two sons, assuming himself also to be in the position of a man having unrestricted control over his estate, first made a prospective division of that estate between the two supposed sons, accompanied by a declaration that either son, in case of disobedience, would forfeit the whole share assigned to him. Subsequently, under an authority which he arrogated to himself, he renounced one of such sons, and also declared the forfeiture to have been incurred; and finally declared the other son to be heir to everything which he, the testator, possessed.

The testator died before any of those acts of his had undergone the definitive arbitrament of the Courts of law.

A grave doubt seems to me to arise whether Chucker Dhur would have made or maintained these dispositions if he had known that his repudiation of one, and his adoption of the other son, were alike unlawful, and that Bonomalee would be thus declared incapable of rendering him those spiritual benefits of which the desire is present to the mind of every orthodox Hindoo, and so largely influences his conduct.

However this may be, the result arrived at after the death of Chucker Dhur was that, in the judgment of the High Court, Suddanund, as there was no sufficient ground for depriving him, had not lost the status of a son, and Bonomalee, having been unlawfully adopted, had never acquired it.

And the utmost effect of Chucker Dhur's will, which is now contended for, is that they give to Bonomalee such property of his as was under his absolute dominion.

And the efficacy of the will to this extent is not disputed by the appellant. And it may be said to be further agreed that whatever is ancestral property is without, and whatever is the independently-acquired property of the testator falls within, this category. And the question is, in fact, narrowed to this, namely, whether property acquired by the exertions of the testator from the profits of ancestral estate can be called independently-acquired.

Mr. Cochrane maintains that this question has been already decided in the particular case by the Judges who gave the decree of 1863, and therefore denies our competency to entertain it now.

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The Judges did, indeed, express an opinion, which will be found at page 320* of Marshall's Report of the case. The obvious fallacy contained in the reasoning of this passage induces me to believe that the learned Judges who employed it could not have given the point that attentive consideration which they must have bestowed upon it, if they had believed themselves to be determining finally the rights of the parties. In any case, for the reasons which I have already stated, I do not consider the parties bound by the opinion.

* "By the Mitakshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited from ancestors and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life, to do as he likes with it. On the other hand, the father has it in his power to dispose, as he likes, of all acquired and all personal property."

As to the question itself, I consider the law to have been settled by the Full Bench Ruling referred to in the judgment of my brother Hobhouse. In this view of the law, a son, under the Mitakshara, is entitled jointly with his father, from the moment of his birth, or, in this case, of his adoption, to the ancestral estate, and also to the profits thereof accruing after his birth, and probably to any such profits accumulated and in hand at the time of his birth, though this latter point is not expressly decided.

I am of opinion, therefore, that the defendant is not entitled to keep back from the heir any immoveable property which has not been acquired by Chucker Dhur otherwise than out of the profits of ancestral estate accruing since the adoption of Suddanund, or in hand at the time of his adoption. This will leave the defendant in possession of lands which he can show to have been acquired previous to the adoption of Suddanund, though out of profits of ancestral property.

It is for the defendant to show that such property was so exceptionally acquired, and I agree that he should now have the opportunity of doing so.

But adverting to the existing rules of procedure, I do not think there ought to be a remand, but the defendant should have a certain time allowed him to offer evidence on this point in the Court below; such evidence to be returned to this Court under directions to be given in accordance with Sections 356 and 357 of the Code.

A remand at this stage, besides being unauthorized by law, will, I am afraid, only lead to a new appeal, and to an indefinite prolongation of the suit.

CASE 996 OF 1867.

27th November.

Special Appeal from Beerbhoom.

Asumtoonissa Beebee, (Plaintiff) *Appellant, versus* Shaik Alla Hafez and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nath Mitter*, J. J.

Baboo Bama Churn Banerjee for Appellant.

Baboo Unnodapurshad Banerjee for Respondents.

This was a suit instituted by the special appellant to recover a two-anna share of certain properties belonging to the estate of her father, one Mahomed Bheekun, deceased. The respondents are purchasers from the brothers of the special appellants, and their main defence to the action was that her father had, by his last will and testament, bequeathed the whole of his estate to their vendors, leaving only a monthly stipend of Rupees 4 for her maintenance. Both the Lower Courts have dismissed the suit, upon the ground of certain admissions alleged to have been made by the special appellant. It is now contended before us—

That admissions alleged to have been made by the party now denying them actually so made, must be proved by the party using them. The mere fact that certain admissions appear in a written statement filed in Court in a certain party's name, is not positive proof that they were admissions of that party. This view strengthened in

First.—That the admissions in question have been accepted by the Lower Appellate Court without any proof that they were really made by the special appellant.

Secondly.—That the Lower Appellate Court has omitted to enquire into the genuineness or otherwise of the will relied upon by the respondents, as also to

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the present case from the consideration that the party alleged to have made the admission is a *purdanusheen*

take into its consideration certain important items of evidence produced by the special appellant.

With reference to the first point, we are of opinion that the *onus* of proof has been thrown upon the wrong party. The authenticity of the admissions in question being impugned by the special appellant, it was for the respondents, who relied upon them, to make out that they had really emanated from her, or from somebody duly authorized by her to make them. The mere fact that they are contained in statements filed in a Court of Justice in her name, does not necessarily prove that they were actually made by her. This view is fully supported by a decision of this Court, reported in page 132, Vol. V, Weekly Reporter. The most mischievous consequences would ensue if the principle laid down in this decision were departed from. So far as we can judge from the circumstances connected with the admissions in question, we think that they are open to very great suspicion. The special appellant is a *purdanisheen* native lady. There is nothing to show who authorized the pleaders by whom those admissions were made. Then, again, it is to be borne in mind that the statements in which those admissions are contained, purport to have been filed, not only on her behalf, but jointly on behalf of herself and her brothers, who were most interested in setting up the alleged will of her father,—a will by which her interest in the inheritance was cut down to a paltry allowance of Rupees 4 per month. We do not wish ot fetter the judgment of the Lower Appellate Cout on a question of fact, but we have adverted to these circumstances, because we find that it has altogether failed to take them into its consideration.

With reference to the second point, we are of opinion that an enquiry into the genuineness or otherwise of the will relied upon by the respondents is of vital importance in this case. The Lower Appellate Court has declined to go into it, upon the ground that the admissions above referred to proved a relinquishment by the special appellant of her legitimate share in the inheritance left by her father. If those admissions were really made by her, they can only be treated as evidence in support of the will, and as nothing more. We also find that the special appellant produced decrees of Court, showing that those admissions were declared to be untrue in the very suits in which they purport to have been made. Other items of evidence were also produced by her bearing upon the same question, but the Lower Appellate Court has altogether failed to take them into consideration. This, we think, is a serious defect in the investigation of the case.

The case is accordingly remanded to the Lower Appellate Court to be retried with reference to the above remarks. Any other issue or issues fairly arising between the parties should also be enquired into.

CASE 1260 OF 1867.

27th November.

Special Appeal from Assam.

Shaikh Koohur Khansamah, (Defendant) *Appellant, versus* Shaikh Jan Khansamah, (Plaintiff) *Respondent.*

Before *Loch* and *Dwarka Nath Mitter*, J. J.

Baboo Mohineemohun Roy for Appellant.
Baboo Bamachurn Banerjee for Respondent.

A decree for conjugal rights cannot, in its terms, order the decree-holder to recover the person of his wife. The document may declare that the decree-holder is entitled to his conjugal rights, and that his wife be ordered to return to his protection.

The following points have been urged before us in this special appeal:—

1*st.*—That the Lower Appellate Court is wrong in giving a decree to the respondent for the recovery of the person of his wife.

2*nd.*—That the Lower Appellate Court is wrong in not awarding to the special appellants costs in proportion to the amount for which the claim of the respondent was dismissed.

With reference to the first point, we think that the decree passed by the Lower Appellate Court ought to be modified in the manner laid down by a decision of this Court, reported in page 104, Vol. II, Wyman's Reporter.

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The modified decree will stand thus: that the plaintiff, special respondent, is entitled to his conjugal rights, and that his lawful wife, Mussamut Beersanee, be ordered to return to his protection.

With reference to the second point, we are of opinion that, under the circumstances of this case, each party ought to bear his own costs.

PART II.

RULINGS IN RENT SUITS.

Special Appeal from Bhaugulpore.

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CASE 658 OF 1867.

Mohessy Lall and others, (Plaintiffs) *Appellants, versus* Ramsahoy Singh and others, (Defendants) *Respondents.*

Before *Kemp* and *Glover*, J. J.

Mr. C. Gregory and *Baboo Debendronarain Bose* for Appellants.
Baboos Mohes Chunder Chowdhry and *Chundermadhub Ghose* for Respondents.

Where plaintiff bought at an execution sale the rights and interests of the proprietors of an estate, and a third party intervened, claiming to receive the rents of the tenants under an assignment from the proprietors, *held*, that the assignment being *bonâ fide*, the sale purchaser could not occupy a higher position than the proprietors themselves, and that the deed of assignment must prevail.

A purchaser at an execution sale buys only what the judgment-debtor possessed, whether a present or reversionary interest.

This was a suit under Act X of 1859 for rent. The plaintiff bought at a sale in execution of a decree, in the Civil Court, the rights and interests of Moddun Mohun and Rajcoomar in a certain estate, and sued the farmers whom he found in possession for rent.

One Barma Chowdhry intervened in the Court of first instance, on the ground that the rents of the farm had been assigned to him by the former proprietors in payment of a bond debt. He was eventually (by order of the Judge on appeal, which was afterwards confirmed by the High Court) made a defendant in the suit, and the case tried in his presence.

The former defendants alleged that they had paid their rents under the assignment to Barma Chowdhry, and were not liable to the purchaser.

The Deputy Collector held that Barma Chowdhry's assignment was extinguished by the sale to the plaintiff, and that the latter was entitled to receive the rents of his property. He decreed the suit therefore against the farmers, and threw out intervenor's objections.

On appeal, the Judge decided that Barma Chowdhry's right to receive the rent of the estate (*minus* a small sum of Rupees 15, not included in the theeka) was not extinguished by the sale to the plaintiff. He bought only the rights and interests of the proprietors, and they did not at the time of sale include the right to these rents.

The Judge found the assignment to be a *bonâ fide* transaction, and that the plaintiff could only recover future rents from the farmer by paying off the intervenor's bond.

The points taken in special appeal are:—

First—That the assignment did not bind the estate; and

Secondly.—That the finding of the Judge as to the *bona fides* of the assignment was erroneous in law.

It will be more convenient to take the second objection first in order.

The special appellant contends, in regard to this objection, that the Judge has found the assignment to be *bonâ fide*, because the bond was so, a deduction he had no right to make. We do not take this to be the Judge's meaning. He says:—"I think this Court, as a Court of Equity, must give effect to the assignment under which Barma Chowdhry was in *bonâ fide* receipt and enjoyment of the rent. The *bona fides* of the transaction is proved by the bond, &c., &c.

No doubt, if the last words of the sentence express the Judge's finding, the case would be as the special appellants put it. But taking the judgment as a whole, we think that the Judge did substantially find that the assignment was a *bonâ fide* one, and that the intervenor was in the receipt of rent under it. The first Court went very fully into this part of the question; and it is clear from the remand order, and from other parts of the

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appellate Court's decision, that this was the opinion come to on this point. Therefore we see no reason to interfere.

With regard to the first objection, we think that the "tunka," being *bonâ fide* in payment of a creditor, would operate as an equitable assignment of the rents of the lands; and that as the owners of the estate had previous to the sale divested themselves of the right to take rent from the lessees during a certain number of years, the special appellants, who bought the proprietor's rights and interests only, cannot occupy a higher position than those whose shoes they now stand in, and must be bound by what would bind them.

A purchaser at an execution sale buys only what the judgment-debtor possessed, whether a present or reversionary right; and if the debtor before that sale, and without any suspicions of collusion or fraud, assigned the rents of his estate in payment of creditors, we have no doubt that such assignment must stand good.

Suppose the debtor had, instead of making an assignment of rents, mortgaged the land for a term of years, no doubt the purchaser at the execution sale would have taken subject to that mortgage; and why should he be placed in any better position because the rents only were assigned? The whole matter depends on the nature of the assignment; if that were *bonâ fide*, the assignment would, and ought to, be binding.

For what were the rights and interests of the debtor at the time of the execution sale? Could he have sued the tenants for these rents? No doubt, he could not on the face of the assignment given to his creditor; and how then can the special appellant, who occupies his position, claim rights which his principal could not have exercised?

It appears to us that the assignment to the creditor, Barma Chowdhry, binds the auction-purchaser; and that if he wishes to collect the rent of his newly-acquired estate, he must pay off the debts due to the assignee.

The special appeal is dismissed with costs.

CASE 236 OF 1867.

23rd September.

Regular Appeal from the 24-*Pergunnahs.*

Prosunno Coomar Paul Chowdhry and others, (Defendants) *Appellants, versus* Koylash Chunder Paul Chowdry and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Kemp*, *L. S. Jackson*, *Macpherson*, and *Glover*, J. J.

Mr. R. V. Doyne and *Baboos Kishen Kishore Ghose* and *Hem Chunder Banerjee* for Appellants.

Mr. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Otool Chunder Banerjee* for Respondents.

A putnee was sold for arrears of rent and purchased in the name of B, the plaintiff treating B afterwards as his tenant. Subsequently, on the rent falling into arrears, plaintiff petitioned the Court, under Regulation VIII of 1819, to sell the putnee, alleging arrears to be due from B. The rent, however, was paid, and the putnee was not sold. In the present suit in the Collector's Court, B is sued, together with C

This case was referred to a Full Bench by Peacock, C. J., and Loch, J. under the following orders:—

Peacock, C. J.—Koylash Chunder Paul Chowdhry and others have sued Gopaul Chunder Mookerjee, Prosonno Coomar Paul Chowdhry, and his wife Binode Money Chowdhrain in the Revenue Court for the rent due under a putnee. The putnee was sold for arrears of rent, and purchased in the name of the defendant, Gopaul Chunder Mookerjee, and afterwards the zemindar treated Gopaul Chunder as his tenant, and petitioned to sell the putnee for the arrears of rent which became due after the sale, and which he alleged to be due to him from the defendant, Gopaul Chunder Mookerjee. That rent was paid, and the putnee was not sold.

The plaintiff has now sued Gopaul Chunder Mookerjee, Prosonno Coomar Paul Chowdhry, and his wife jointly in the Collector's Court for the subsequent arrears, alleging that the estate was purchased by Prosonno Coomar Paul Chowdhry and his wife in the name of Gopaul Chunder Mookerjee, benamee, for them.

Evidence was given to show that part of the purchase-money was paid

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in notes, which was the proceeds of a putnee which stood in the name of the lady, and which was sold; and there is no evidence as to the person by whom the remainder of the purchase-money was paid.

It was further given in evidence that the treasury of the husband and wife was a joint treasury.

It is necessary, in consequence of the decisions to which we shall presently advert, to refer this case to a Full Bench.

One question, which we reserve for the opinion of a Full Bench, is whether the Collector was competent to try whether Prosonno Coomar Paul Chowdhry alone was beneficially interested in the putnee which was bought in the name of Gopaul Chunder, upon the ground that whatever interest his wife might have had in it was benamee for him; or whether Prosunno Coomar and his wife were jointly and beneficially interested in the putnee bought in the name of Gopaul Chunder, or, if not jointly, what were their respective interests therein, for the purpose of ascertaining whether Prosunno Coomar and his wife were jointly liable for this rent; or whether they were to be rendered liable according to their respective beneficial interests in it.

There are several cases to show that persons may be responsible in equity to pay rent, although they are not the legal tenants, or legally responsible. It is very doubtful, however, whether, in such cases, the liability which would have to be enforced in a Court of Equity in England, could be tried and enforced by a Collector under Act X of 1859.

Two of the cases in which persons not responsible at law have been held responsible in equity for the payment of rent, and performance of covenants in a lease, are Clavering *versus* Westley and others, 3 Peere Williams' Reports, page 401; Lucas *versus* Comerford, 3 Vesey Junior's Reports, 235. *Cestuique* trusts of a lease, taken in the name of a trustee, were held liable to make good, according to their respective beneficial interests, the rent due from the trustee in the event of the lessors being unable to recover it from him. In that case the equity against the *cestuique* trusts appears to have resulted from the fact of their entering into possession and taking the profits.

In Lucas *versus* Comerford, 3 Vesey's Reports, page 235, which is also referred to in Wilkins *versus* Fry, 1 Merivale's Reports, page 264, as an authority, it was held that a person with whom a lease had been deposited as a security for a debt, and who had entered into possession of the property, was bound to take a legal assignment of the lease, in order that he might be responsible in law for the performance of a building covenant contained in it.

There are other cases in which persons have been decreed to be equitably liable for rent for which they could not be made legally responsible.

In similar cases in this country, if the same equities could be enforced here as in England, there would be strong grounds for contending that those equities must be enforced in the ordinary Civil Courts, and not in the Court of the Collector, under Act X of 1859.

We will not express any opinion upon that point until it has been argued in the Full Bench. Several cases have been cited from which it may be contended that the Collector has the power to try a person, whether he is not the actual tenant, or is not equitably responsible for the rent. The first case is Goluck Chunder and others *versus* Teluck Chunder and others, in the Sudder Dewanny Adawlut Reports, page 283, 26th June, 1862. There is another in Hay's Reports, page 449, reported in the special number of the Weekly Reporter, page 58. There was also a case before Bayley and Elphinstone Jackson, J. J., decided on the 17th December, 1863; and another by Trevor and Loch, J. J., decided on the 6th June, 1862, which bear upon this question, but which have not been reported.

The second question which we refer for the opinion of the Full Bench is whether the lessors, having made their election to treat Gopaul Chunder as their tenant when they petition, under Regulation VIII of 1819, for the sale of the putnee for arrears of rent, can now elect to treat the persons beneficially interested as their tenants.

and C's wife D, for subsequent arrears, plaintiff alleging that the putnee was really purchased by C and D in the name of B, who was their *benamee*.

The points referred to the Full Bench were:—(1) whether the Collector was competent to try whether C was beneficially interested in the putnee, on the ground that whatever interest his wife might have in it was *benamee* for him; or whether C and his wife were jointly and beneficially interested in the putnee; or if not jointly, what were their respective interests, in order to ascertain whether C and D were jointly liable for the rent; or whether they were to be rendered liable according to their respective beneficial interests in it; (2) whether plaintiff, having elected to treat B as his tenant when he petitioned, under Regulation VIII of 1819, to sell the putnee, can now treat the persons beneficially interested as his tenants.

[*A difference of opinion existed in the Full Bench as to whether the first question arose in the case, or should be answered by the Bench. The rules which should guide the Bench in such cases were discussed.*]

Held, by a majority, that it was proper to answer the question in this case, and *ruled* that the Collector had no jurisdiction to determine the equities of the case; and (2) that plaintiff was not estopped from suing C and D by his former recognition of their benamee B.

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On this point, the case in Volume III. of Wyman's Journal, page 15, decided on the 27th June, 1864, is an authority to show that, having once elected to treat the furzee as their tenant, they cannot now sue the beneficial owner. The Deputy Collector, in his judgment in this case, has drawn a distinction between that case and the present. With regard to the case cited from Hay's Reports, page 449, which was decided by me, among other Judges, there appears to have been no question raised as to the extent of the beneficial interests of the defendants, inasmuch as there was only one person sued as the defendant in that case. The case was one of special appeal, and was treated as if the person who took the lease in that case had taken it in his own name as agent for an unknown principal. That case was decided upon the rule applicable to contracts made by agents for unknown principals, and not upon the ground that the Collector could deal with equities and adjust the proportions. In short, *cestuique* trusts can be made liable for rent for which their trustee is legally responsible.

In this case the lady denies having any right or interest. The plaintiff is willing to abandon all claim against her. The husband contends that the plaintiff cannot abandon his claim against the wife if she is liable for any portion of the rent, and make him liable for the whole if he is not liable for it; that the question to be determined is whether the wife is beneficially interested in any and what proportion, and whether the Collector cannot try that question.

It appears to us that the plaintiff has no more right to abandon his claim against the lady, and to say that the husband is wholly responsible, than he would have to abandon his right against the husband, and say that the lady is solely responsible.

JUDGMENT OF THE FULL BENCH.

Glover, J.—It appears to me that we ought to answer both the questions submitted by the Division Bench.

It may be that they were not raised in the Courts below, and that the objection was not taken here when the appeal was first heard. But it cannot be said that the points are not deducible from the pleadings; and it is clear that they were taken and argued at a considerable length before the Division Bench which heard the case after remand.

It appears to me, further, that that Bench would have been justified in referring the question to a Full Bench of this Court, whether it had or had not been opposed by the parties to the appeal, if it considered the point to be one of importance, and concerning which contradictory rulings of Division Benches were in existence.

A Full Bench of this Court is, I conceive, bound to afford every possible assistance to the Division Benches, and to give them the benefit of its authoritative opinion on all points referred, which are in any way deducible from the case sent up. Indeed, I am by no means certain that it ought not to take into consideration any and every question of law which a case might involve, whether it be apparent on the pleadings or not. However, there is no necessity for my going so far in the present case as the points at issue, though not directly raised, are certainly to be found in the pleadings.

I think that the first question should be answered in the negative, and that the Collector had no jurisdiction, under Act X of 1859, to decide as to the amount of beneficial interest, if any, possessed by the three co-defendants.

The proper Court to decide the equities between them, and to fix their liability to pay rent, would be the Civil Court; and that Court would have to find the relationship of landlord and tenant, and the extent of each person's interest, before the Collector could come in and adjudicate the rent due under Act X.

On the second question proposed, there can, I think, be no doubt whatever that a person suing a benameedar in the first instance, is not estopped thereby from hereafter suing those whom a more correct and searching enquiry has shown to be the real beneficial owners.

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This question therefore should be answered in the affirmative.

Macpherson, J.—The first of the questions raised on this reference is one upon which it appears to me that this Court ought not to give an answer, (to the full extent of the question) inasmuch as the points raised do not properly arise in the case.

Being of opinion that the question does not arise in the case, I am only following the practice which has been acted upon frequently by Full Bench Courts, if I decline to return any answer to it.

In the case of Greesh Chunder Lahoory *versus* Fukeer Chand Khan, (6 Weekly Reporter, Miscellaneous, 72) a reference was made to a Full Bench by Mr. Justice Loch and myself upon a most important question, in which we differed from a judgment of another Division Court. We referred a general question as to the position of the assignee of a decree. "In the event of there being cross-decrees, and one of these decrees being transferred by the decree-holder to a third party in a *oonâ fide* sale, without any special notice to the purchaser of the existence of the cross-decrees, whether the purchaser does not take it with all the liabilities and equities of the vendor which were attached to it." The case came on before the Full Bench, and the Court declined to answer the question which we put, upon the ground that the question did not arise upon the facts as stated by us. The Court (of which I myself was a member) held that, upon the facts as stated by us, it was not necessary to answer the question, remarking:—"It is therefore unnecessary for us to determine whether the assignment made any difference or not. If we were to determine that point, our decision would be a mere *obiter dictum*." In that case, the fact that a decision upon the particular point referred was not absolutely necessary, appeared from the statement of the case sent up by the Judges who referred it. So in the present instance, a decision on this first question (to its full extent) appears upon the face of the statement of the referring Judges to be unnecessary. The plaintiffs are, in the order of reference, stated to be suing, alleging "that the estate was purchased by Prosunno Coomar Paul Chowdhry and his wife in the name of Gopaul Chunder Mookerjee, benamee, for them." It appears to me that upon a plaint setting up such a cause of action, the various issues as to remote beneficial interests and equities which have been suggested in the first question referred to us do not arise. And, as a matter of fact, no such issues were ever raised by any of the parties, whether plaintiffs or defendants, in their pleadings, or before the Lower Court, or before Mr. Justice Loch and myself, when the case was before us in January last, and we sent it back in order that further evidence might be taken in behalf of one of the defendants.

Again, there is a case (Gopaul Chunder Roy *versus* Gooroodass Roy, 7 Weekly Reporter, 135) in which the Full Bench was of opinion that the point which had been referred to did not arise under the circumstances, and the Court declined to give any opinion.

There the case, as stated by the referring Judges, did not disclose such a state of facts as showed that the questions referred to did arise.

In the case of Rankânt Chowdhry *versus* Bhoobun Mohun Biswas, (Weekly Reporter, special number, 183) the Chief Justice, upon the ground that it did not arise in the case, did not answer the question referred, but the rest of the Court did answer it.

Upon these authorities I think that we ought not now to decide the first question to its full extent. But some part of the question does arise in the case, and that part I am prepared to answer. I think there is no doubt whatever, both on the authority of the decision in the case of Heeralall Bukshee *versus* Rajkishore Mozoomdar, (Hay's Reports, 449) and of the other cases referred to, and on the general construction of Act X of 1859, that the Collector has power to try the question raised in the plaint in this suit; that is to say, to try the question whether or not Prosunno Coomar and his wife, or either of them, purchased this putnee benamee in the name of Gopaul Chunder. I have no doubt that the Revenue Courts have jurisdiction to try

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whether these defendants, or either of them, by reason of their own possession, or that of their agent, are in the position of tenants towards the plaintiffs; whether, in short, they are substantially the tenants of the land, and as such liable for the rent now sued for.

As regards the second question, whether or not the plaintiffs are estopped in the present suit from proceeding against the defendants, who are said to be principals, on the ground that they formerly took proceedings against the defendant, their agent, in order to recover rent for a period different from that the rent for which is now sued for, it appears to me that the former proceedings are no bar whatever.

The present suit is no doubt wrongly brought, in so far as it is brought against both the principals and their agent, and the plaintiffs ought to have been put to their election as to whether they would proceed against the agent or against the principals. This is the only point (bearing on the second question) that was decided in the case of Shaikh Kanyah, reported at page 88 of Sutherland's Reports for June, 1864, (Act X Rulings). That case does not decide that, because the agent was formerly proceeded against, the defendants, who are now discovered to be the principals, cannot be sued for rent for a different period; it merely decides that a suit is bad where the principal and the agent are sued together as jointly liable.

An unreported decision of the late Sudder Court, dated 6th June, 1862, in special appeal No. 336 of 1861, was referred to as showing that the present suit is barred. But it appears to me that the ruling in that case is not correct; and however this may be, the circumstances of the case are very different from those now before us.

As regards the second question, I would answer that the present suit is not barred by the proceeding under Regulation VIII of 1819.

Jackson, J.—I am of opinion that both the questions proposed to us by the Division Court ought to be answered. I entirely agree with Mr. Justice Macpherson in thinking that the Full Bench, on having a question referred to it for the decision of a particular law point, if, on looking into the case, so far as it is necessary for the purpose, it should find that that law point does not arise, ought to desist from answering it. Very serious inconvenience arises from following an opposite course. For instance, not very long ago, a question was referred by a Division Bench to a Bench of five Judges, namely, whether a decision *inter alios* was admissible in evidence, and was conclusive evidence against parties in a suit before the Bench. The Full Bench went very fully into the whole matter, and decided that the judgment in question was not conclusive evidence, and was not admissible in evidence at all. Subsequently the question of admissibility arose before a Division Bench, and that Division Bench, looking into the question which had come before the Full Bench, came to the conclusion that the point whether or not such a judgment was admissible in evidence had not fairly arisen upon the case in which the reference took place, and consequently declined to accept the decision of the Full Bench as conclusive authority upon that point, and went on to decide the point on its own view of the law in the opposite sense to the decision of the Full Bench.

It is quite clear to me that decisions of a Full Bench, if they are to be useful, must be conclusively binding in future Division Benches of this Court, until they are afterwards set aside by the authority of the Full Court, or of a Court composed of a larger number of Judges. Therefore I would refrain from giving an opinion on any point unless I saw that it clearly arose in the case referred to, as in the present state of the law, there seems to be no power to state cases for the opinion of a Full Bench.

The question now referred is whether the Collector was competent to try whether Prosunno Coomar Paul Chowdhry alone was beneficially interested in the putnee which was bought in the name of Gopaul Chunder, upon the ground that whatever interest his wife might have had in it was benamee for him; or whether Prosunno Coomar and his wife were jointly and beneficially interested in the putnee bought in the name of Gopal Chunder, or, if not jointly,

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what were their respective interests therein, for the purpose of ascertaining whether Prosunno Coomar and his wife were jointly liable for this rent; or whether they were to be rendered liable, according to their respective beneficial interests in it.

Now, it is said that this question does not actually arise upon the plaint. That, no doubt, is so. The plaint has been framed entirely upon the allegation that those two defendants, Prosunno Coomar and his wife, had employed the defendant Gopaul Chunder to purchase the talook for them, and that they had since been in possession of the talook; that is to say, a question of agency. But I observe that the Collector has gone into the question of beneficial interests. He has raised, though not very distinctly, the issue whether the other two defendants were beneficially interested in the talook or not. I also observe, as far as I had an opportunity of looking into the evidence, that evidence upon such an issue was adduced before the Collector.

Now, I presume the Collector is authorized to frame the issues under Act VIII of 1859, not only from the plaint, but from the written statements, and from the examination of pleaders or persons who appear before him. I would therefore rather prefer to presume that the Collector had found, in some examination taken before him, or in the written statements, an allegation that these defendants were beneficially interested in the talook, and I the more readily do so because the plaintiff adduced evidence to support such an allegation. The question being to that extent raised, I think it fairly enough arises on the case before us to justify the Full Bench in giving an answer.

As to the particular answers to be given to the questions, it is quite clear that the Collector would not be competent to decide such a question as that involved in the first put to us by the Division Bench. This appears to be precisely such a case as, in England, would oblige a plaintiff to resort to a Court of Equity to obtain relief, and in which he would have no remedy at common law; and, in like manner, it seems to me to be such a case as is not within the jurisdiction of the Collector, who is restricted to try questions between a landlord and his actual tenants, persons between whom, directly or indirectly, some engagement has been entered into. But where the landlord seeks to make other persons liable by reason of their having a beneficial interest in the tenure, he must resort to the regular Civil Courts, which take cognizance of all causes of action of which their cognizance is not expressly taken away.

As to the second question, it appears to me also perfectly clear that the plaintiff is not estopped, by reason of his former proceedings against Gopaul Chunder, from suing in the proper Court the defendants whom, upon fuller information, he has discovered, and whom he now declares to be beneficially interested.

I would therefore answer the first question in the negative, and the second question in the affirmative.

Kemp, J.—I am of opinion that the first question put to this Bench is one that does not arise in the pleadings or in the case, as the parties put the case in the Court below. I think, therefore, that we should decline answering the question.

I also observe that neither in the plaint, nor in the written statements, nor in the case made by the parties before the Court below, was any question of remote liability or equities raised, nor does any such question appear in the Collector's proceedings, as is quite clear on referring to the decision of the Collector at page 18, where he says:—"The defence therefore set up is that the purchase in Gopaul's name was benamee, he being merely the servant of the other defendants, who are solely liable for the rent. The purchase not having turned out so profitable an investment as was believed, the real proprietors are now anxious to disclaim all connection with the under-tenure, and represent the ostensible proprietor as solely responsible to the zemindar. This is the 'only' issue in the case, and it is an issue which it has been ruled the Revenue Courts must try."

Therefore, in my opinion, the first question put before us does not arise,

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either in the written statements, or in the case made by the parties before the Court below, and I would therefore decline to answer it.

As to the second question, I am of opinion that the plaintiff is not barred by any proceeding which was taken against Gopaul Chunder under Regulation VIII of 1819.

Peacock, C. J —I quite agree as to the second question that the plaintiffs having treated Gopaul Chunder as the tenant when he was not aware of the whole circumstances of the case, would not stop him from treating other persons as his tenants afterwards, when he knew of those circumstances, if the facts showed that the other parties, and not Gopaul Chunder, were the tenants.

With respect to the first question, it appears to me that it ought to be answered, and that it was one upon which the Division Court might fairly and properly ask the opinion of a Full Bench, in order to enable it properly to deal with the whole case with reference to other decisions which have been passed by Division Benches.

The object of referring cases to a Full Bench is to prevent conflicting decisions between Division Benches; so that one Bench shall not be deciding a question one way on one day, a second Bench deciding the same question another way on another day, and a third Bench probably deciding it differently from the other two on a third day; and that when a Court finds two conflicting decisions, or a decision conflicting with its own view of the case, instead of overruling the decision of a Bench having concurrent jurisdiction, it should refer the matter to a Full Bench, so that the public should not be subject to have conflicting decisions issued from the High Court.

In carrying out that rule, I have always endeavoured, as far as it has been in my power, to assist the Division Benches by which questions have been referred, by examining the authorities bearing upon the point, and by explaining the law upon the subject to the best of my ability, and by giving reasons for my opinion, so as to settle the point, as far as possible, for cases in which it might arise in future.

In the case which has been referred to from 6 Weekly Reporter, page 72, Miscellaneous Cases, the case was this: A had recovered a judgment against B in the Judge's Court. B recovered a judgment against A in the Court of the Principal Sudder Ameen. B sold his judgment to C, who wished to enforce it against A. A asked to be allowed to set-off the judgment which he had recovered against B in the Judge's Court, notwithstanding the sale by B to C, who was a *bonâ fide* purchaser of the judgment recovered by A against B. The question which was asked by the Court was this:—"In the event of there being cross-decrees, and one of these decrees being transferred by the decree-holder to a third party by a *bonâ fide* sale, without any special notice to the purchaser of the existence of the cross-decree, whether the purchaser does not take it with all the liabilities and equities of the vendor which attach to it."

In the statement of the case referred to for the opinion of this Court, it was shown that the judgment which A had recovered against B was in the Judge's Court, whereas the judgment which B had recovered against A was in the Principal Sudder Ameen's Court; and the Court came to the conclusion, whether right or wrong, that the two judgments, not being in the same Court for execution, could not be set-off one against the other under the terms of Act VIII of 1859.

Being of opinion, therefore, that one of those judgments could not be set-off against the other, and could not have been set-off, even if it had not been transferred, the Court answered the question, and pointed out that those two judgments could not be set-off one against the other, whether transferred or not; and it did not go into the other question, which became unnecessary. The Court said:—"In this case the decree of the Judge's Court was not sent to the Principal Sudder Ameen for execution. The two decrees were therefore not decrees of the same Court; nor was the decree of the Judge's Court sent to the Principal Sudder Ameen's Court for execution. The case does not fall within the provisions of Section 209. It is therefore unnecessary for us to determine whether the assignment made any difference or not."

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The question as to the effect of the assignment did not arise in that case, and the Full Bench would have misled the Division Bench if it had simply answered the question propounded, without pointing out to the Division Bench that, in their opinion, the judgments were not judgments which could be set-off against each other, independently of the question as to the assignment. I therefore think that the Court was right in that case in not going on to determine the second question, especially as some Division Benches do not consider themselves bound by what they call *obiter dicta* of a Full Bench.*

In another case the following question was asked:—"Whether a decision upon the question of adoption was admissible in a suit between different parties." I was one of the Judges, and the learned Judge beside me (Mr. Justice Louis Jackson) was the other Judge, who referred the question. We asked a Full Bench whether the judgment was admissible against the plaintiff, who was not a party to the former suit; and if so, whether it was conclusive or merely *primâ facie* evidence against him. It was an important question whether it was admissible at all, even if it should be held that it was not conclusive as a judgment *in rem*. Two questions were referred: *first*, was the judgment admissible and conclusive? *second*, was it admissible at all for any purpose, whether as *primâ facie* evidence, or in any other way? The two questions were distinctly raised, and they were distinctly answered. But in a subsequent case it was held by a Division Bench that the answer that the judgment was not admissible at all was an *obiter dictum*. If that ruling is to be acted upon, and if Judges of a Division Bench are to go into each case, and see whether the answer of a Full Bench is an *obiter dictum* or not, great difficulties will constantly arise. I say, after careful reflection, that the two questions were absolutely necessary to be determined. If uniformity of decision in the High Court is desirable, as it undoubtedly is, one Division Bench ought not to decide contrary to a *dictum* of another Division Bench without referring the question to a Full Bench; still less ought it to decide contrary to a *dictum* of a Full Bench, at any rate without referring the question.

* See 3 Wyman's Reporter, Civil Rulings, 240.

In the other case cited from 3 Wyman's Reporter, page 230, the question asked was whether, where a pottah, purporting to be of a date anterior to the decennial settlement, is filed, and is found as a fact to be a forgery, the party propounding such forged pottah can have the benefit of the presumption arising from paying fixed rents for twenty years under Section 4, Act X of 1859.

The Full Bench might have answered the question in the affirmative, and said that the party was entitled to the benefit of that presumption. If they had done so, they would have led the Division Bench into a most serious error; for it was admitted, on the argument before the Full Bench, that the suit was brought before Act X of 1859 was passed; and therefore the Full Bench pointed out to the Division Bench that the question did not arise under the circumstances of the case. The Full Bench did not wish to mislead the Division Bench, as it would have done if it had merely answered the question, but finding that the Division Bench was under a mistake in supposing that Act X applied to the case when the words of Section 4 were—"Whenever, *in any suit under this Act*, it shall be proved," &c., said—"It being admitted that this suit was brought before Act X of 1859 came into operation, the question does not arise whether a party who has propounded a forged pottah could have the benefit of the presumption arising from paying a fixed rent for twenty years, Section 4, Act X of 1859, applying only to suits commenced under the provisions of that Act. Therefore the point which has been referred to us does not arise."

Instead of answering the question, the Full Bench pointed out to the Division Court that the case was not one in which Section 4, Act X of 1859, was applicable, or could be taken into consideration. I cannot think that the Court was wrong in giving judgment in that way. For my own part, I can only say that I am always most desirous to give every assistance in my power to a Division

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Bench by answering every question which is submitted for the opinion of a Full Bench, when it can be done without leading the Court which asks the question into error.

Another case has been cited from the special number of the Weekly Reporter, page 183. In that case the suit was brought to fix the rent of certain land, and to obtain a kubooleut from the defendant. It appeared to the Full Bench that the defendant was a mere trespasser, and not a tenant, and that the plaintiff could not therefore sue him to obtain a kubooleut under Act X of 1859. The question whether a zemindar could sue for a kubooleut at an enhanced rent, without giving notice of enhancement, did not arise. If the Full Bench had answered the question, they would have misled the Division Bench, as, under the circumstances of the case, the zemindar could not, even if he had given notice of enhancement, have sued for a kubooleut.

I have made this explanation because I think it ought not to go forth that a Full Bench is disinclined to answer any question that properly arises out of a case before a Division Bench, or that it has ever intentionally declined to answer any such question which has been referred to it for its opinion. It has always, to the best of its ability, answered such questions, and endeavoured to throw as much light upon the case, and to give the Division Bench as much assistance as possibly it could.

The only cases in which a Full Bench has not answered directly questions which have been raised for its opinion, are those in which, by giving direct answers to the questions, it would have been likely to mislead the Division Benches by which the questions were asked.

In this case, finding that there were conflicting decisions, the Division Bench, of which I was one of the Judges, felt bound to refer the case to a Full Bench. The Division Bench, before sending the case back to the Collector to be determined finally, wished to know whether the parties were bound by equities, and whether the Collector, having jurisdiction in such a case, had power to determine mere matters of equity. Three of the Judges of the Full Bench have answered the question, but the other two Judges think that they ought not to answer it. I regret exceedingly that the Division Bench will not have the weight and benefit of the opinion of those two Judges. But when the case goes back, the Division Bench will have the opinion of only a majority of the Judges of the Full Bench; it will have to deal with the case in the best manner it can under the circumstances, regretting that it has been deprived of the valuable opinions of the two Judges who have declined to express any opinion upon the case.

In my own opinion the Collector had no jurisdiction in the case. I am of opinion that when the Legislature took away from the regular Civil tribunals of this country the right of determining questions with regard to rent, they intended to take away from them, and to vest in the Collector's jurisdiction those cases only in which the question might arise between a landlord and his tenant. Two persons may be joint tenants, and as such may be jointly liable for rent. A, and not B, may be the tenant of certain lands. There may be circumstances under which B may be equitably liable to pay the rent legally due from A. But the liability of B does not arise from the legal relationship of landlord and tenant. I apprehend it was never the intention of the Legislature to empower the Collector to try questions relating to rent depending upon equitable rights and liabilities arising from circumstances other than those of the relationship of landlord and tenant. An Act, by which the jurisdiction of the ordinary Courts of Judicature is taken away, must be construed strictly. The jurisdiction of the ordinary Courts of Judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not show clearly that it was the intention of the Legislature to deprive such Courts of their jurisdiction. Looking at this Act X of 1859, I hold that it was not the intention of the Legislature to take away the jurisdiction of the ordinary Courts of Judicature of trying whether, under particular circumstances, other persons than the actual tenants of the land might not, according to the rules of equity, be liable to pay the rent of that land. That is the question which I wished

to have answered when the Division Bench put the question in the form in which it was submitted. It appears to me that the question must be answered in the negative, and that the Division Bench should be informed that the Collector was not competent to try the points involved in the first question.

The case will go to the Division Bench for the purpose of being determined by them, and I shall avail myself of the benefit which I have had of learning from my honourable colleague on my right (Mr. Justice Kemp) what the plaint actually states. The Division Bench may possibly have asked this question unnecessarily, and may have been the cause of fruitlessly and unnecessarily wasting the time of two of the Judges of this Court for four or five hours on a matter which may ultimately turn out to be immaterial. I endeavour to be as accurate as I can. But a preliminary question having been raised, that the Collector could not deal with matters of equity, I wished to know, before I went into the whole case, both as to the plaint and the evidence, whether the Collector had jurisdiction to deal with mere equitable rights and liabilities, and whether the Division Bench, sitting in appeal from the judgment of a Collector, was entitled to deal with such matters before they had been tried in the first instance by a Court of Ordinary Civil Jurisdiction. It appeared to me that the Collector had such jurisdiction, and that the case ought to have been brought before the proper Court of Civil Judicature. Having now obtained the opinion of a majority of the Judges of a Full Bench, I shall be able to express my own judgment upon it when the case goes back to the Division Bench.

Kemp, J.—The majority of this Bench is against me, and the learned Judges constituting that majority have thought it right to answer the first question. I may add that if I could bring myself to think that the question was raised, I should have answered it in the same manner as they have done.

Macpherson, J—As the majority of the Court hold that the first question (in its full extent) does arise in this case, I think it right to add that, as regards the point of law involved, my opinion is the same as that which is expressed in the answer which the majority of the Court propose to give. I am of opinion that the Revenue Courts have no jurisdiction to try a suit for rent when the issue is not merely whether the defendants are, by reason of their own possession, or that of their agent, (*e. g.*, one who holds for them benamee) in the position of tenants, and as such liable for the rent; *but whether*, by reason of their having a beneficial or equitable interest of some sort in the tenure, they are in equity liable to be charged with the rent.

Special Appeal from Rajshahye.

CASE 1174 OF 1867

22nd November.

Bhoobun Mohun, *alias* Prolad Sandyal, (one of the Defendants) *Appellant, versus* Bhubo Soondurry Dabea Chowdhrain (Plaintiff) and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Baboos Sreenath Dass and *Otool Chunder Mookerjee* for Appellant.

Baboos Unnodapurshad Banerjee and *Chunder Madhub Ghose* for Respondents.

This appeal is preferred against a decision for a considerable amount of rent, not by the lessee, who was one of the defendants, but by the surety.

A suit for arrears of rent, under Clause 4, Section 23, Act X of 1859, will lie in the Collector's Court, as well against the lessee's surety as against the lessee.

The first point taken is that the action will not lie against the surety in this case, and that any suit against him ought to be instituted in the Civil Court, and not in that of the Collector. But we think this objection untenable. The suit, to all intents and purposes, may be termed a suit under Clause 4, Section 23 of Act X of 1859, being one for arrears due on account of rent; and as such, it may fairly be entertained both against the lessee, who was made originally liable, and against the surety, who would be liable on the default of the lessee.

This is the view taken by a Bench of three Judges of the late Sudder Court in a case decided on the 28th June, 1862, (Sudder Decisions, page 297,)

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in the case of Kumaroonissa Begum, which is on all fours with the present; and we see no reason for not following the rule therein laid down.

The next objection taken is that the Judge was wrong in not allowing the defendant remission for some lands which had diluviated. But we see nothing legally erroneous in the decision of the Judge, who held that a remission by a naib, who was shortly afterwards dismissed from his office, required the sanction of the zemindar, which sanction was not given.

The third and last objection taken is that the defendant should have had credit for a sum of Rupees 137 deposited when he took the lease, and for Rupees 14 spent on account of zemindaree dâk. There is, however, nothing to show that these points, on which the first Court had no proof adduced, were really pressed on the notice of the Judge.

The Judge first recounts the points on which issues were taken, and then proceeds, on an appeal before him by both parties, to decide them *seriatim*.

We affirm his decision, and dismiss this appeal with costs and interest.

CASE 1294 OF 1867.

27th November.

Special Appeal from Chittagong.

Abdool Ali and others, (Defendants) *Appellants, versus* Yar Ali Khan Chowdhry, (Plaintiff) *Respondent.*

Before *Loch* and *Dwarka Nath Mitter*, J. J.

Baboos Bamachurn Banerjee and *Lulleet Chunder Sein* for Appellants.
Baboos Greeshchunder Ghose and *Obhoychurn Bose* for Respondent.

A suit will not lie for a kabooleut for a portion only of land included in one entire holding.

The first point taken before us in these three appeals is that a suit will not lie for a kabooleut for a portion of the lands included in one entire holding. We think this objection to be a valid one. Upon the respondent's own showing, it appears that the land in dispute in each of these three cases forms part of an under-tenure for which a kabooleut and pottah have been already exchanged between the parties. There can be no doubt, therefore, that the respondent had no right to sue for a separate kabooleut for this land. This view is fully supported by the decisions of this Court, reported in page 219, Volume VIII, Weekly Reporter; and page 106, Volume VI, Weekly Reporter, Act X Rulings.

These three appeals are accordingly decreed, but without costs, inasmuch as the objection has been taken at a rather late stage of the proceedings. The other grounds of special appeal need not be gone into.

PART III.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

Amrit Nath Jha versus *Ahmed Reza and another.*

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CRIMINAL JURISDICTION.

CRIMINAL RULINGS.

When the Assistant Magistrate referred to a proceeding recorded by the Magistrate of the district on a prior date, and from that proceeding declared himself satisfied that a dispute involving a probable breach of the peace existed.

Held. per Jackson, J., that the prior proceeding of the Magistrate could form no foundation for an enquiry by the Assistant Magistrate under Section 318 of the Code of Criminal Procedure.

Held, further, that the omission of the Assistant Magistrate in proceeding under the said Section to specify the land in respect of which the dispute had arisen, was also an error vitiating his proceedings.

Held, per Hobhouse, J., that the proceedings of the Magistrate might form a ground sufficient to warrant Assistant Magistrate in going further and that the specification of the land was not shown to be indefinite; but that the facts in the present case did not establish the probability of a breach of the peace.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Jackson, J.—It appears to me that the order which the Assistant Magistrate of Kissengunge made in the present case, and which has been brought under our consideration, cannot be supported.

This order relates to alleged disputes between Syud Ahmed Reza and Inayet Hossein, who are large zemindars in Zillah Purneah, on the one hand, and Amrito Nath Jha, who is a person claiming to hold lakheraj lands in the estates of these zemindars, on the other hand. An order, under Section 318 of the Code of Criminal Procedure, between these same parties had been made last year (1866), and that order came before this Court on the 27th August in the same year, and was set aside by judgments of this Court, which are to be found at page 61 of Vol. VI, Weekly Reporter. The principal grounds upon which the judgment of the Court proceeded were, in the first place, that the Magistrate was wrong in not recording a proceeding showing the ground upon which he was satisfied that the dispute was one likely to lead to a breach of the peace, and next that he had done wrong in throwing the *onus* of proof on a certain party by reason of the title supposed to exist in the opposite party. But another ground also was, that the Magistrate had not made it clear what the lands were in respect of which he made his adjudication.

Two of these objections appear to me to apply with quite equal force to the order which has now been made by the Assistant Magistrate. The proceedings took place before that officer, and he starts with a declaration on his own part, which is to this effect:—"From the proceeding recorded by the Magistrate of this district, and dated May 3rd, 1867, I am satisfied that a dispute likely to induce a breach of the peace exists concerning lands situated in the villages

Goolgach	...	...	...	400	Beegahs.
Anundgach	...	...	...	50	"
Gumadigga		...	...	250	"
Boggeshari	...	...	...	200	"
Baragach	...	...	...	200	"
				1,100	Beegahs.

This officer therefore refers for the grounds of satisfaction on which his mind rested in regard to this enquiry to the proceeding recorded by his superior, the Magistrate of the district. On turning to that proceeding, a copy of which is annexed to the record, it appears that the Magistrate of the district had before him no recent information, nor any information as to an existing dispute. But it appears that, having received charge of the Magistracy of this district, he had referred to certain records to be found in his office, and upon reference to those records he found that claims to lakheraj lands within the zemindaries of Ahmed Reza and Inayet Hossein had been set up by Amrito Nath Jha in respect of a number of villages, and that in some of the villages to which these claims related charges of plunder, extortion of kubooleuts from ryots, and in one case of murder had been made, some by

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CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

one party, some by the other. It is true that no conviction appears to have resulted in a single one of these cases; they were all either found to be false, or struck off the file for one reason or another. Upon these premises the Magistrate thought fit to record that he was satisfied that a dispute likely to induce a breach of the peace in respect of such lands in these villages had occurred; but he thought that the inquiry in respect of these disputes should be kept within defined limits, and he therefore took the pains, by collation of various papers and records, to ascertain what claims had been made at different periods by Amrito Nath Jha in respect of lands in different villages, and what was the extent of those claims; and then he selected out of the villages, in regard to which such claims had been made, five villages, as to which he stated that outbreaks had occurred, and he therefore directs the Assistant Magistrate to institute enquiries under Section 318 of the Act

It appears to me that this proceeding discloses no such grounds as could form a legal foundation for an enquiry under Section 318. It seems quite manifest that reference to previous records could not show that a dispute existed which was likely to induce a breach of the peace. It is also clear that the mere preferring of a variety of criminal charges, all of which turned out to be false or unfounded, could form no foundation for such a proceeding; and I am quite clearly of opinion that the existence of satisfaction on this subject in the mind of the Magistrate of the district could not form satisfaction, enabling the Assistant Magistrate to enter upon this enquiry himself. Whether the Magistrate himself might have issued a summons to the parties, and then, after the case had been commenced, could have made it over to the Assistant Magistrate, supposing him to be invested with the proper powers for investigation, is another question. But what had happened is, that the Magistrate had recorded his own satisfaction upon what appears to me not to be legal grounds; that that satisfaction so recorded has been accepted by the Assistant Magistrate, and has been made the basis of this proceeding.

But there is another and, what appears to my mind, a still stronger objection to this proceeding. It appears to me altogether impossible to say or to ascertain to what lands the proceedings related. The word "gach" in the singular and in the plural respectively occurs, and the learned Counsel who appeared to support the order (Mr. Doyne) contended, in a part of his address to us, that a "gach" was a certain defined and ascertained thing, and that the order of the Assistant Magistrate related to a certain number of "gaches" in their entirety. But neither the learned Counsel, nor any one else in Court, could state to us what a "gach" really meant. In this uncertainty I have carefully gone through the proceedings of the Magistrate and of the Assistant Magistrate; and it appears to me perfectly clear that the claim of Amrito Nath Jha was understood to refer, and that the award itself related to lands varying in quantity, and forming parts of different mal villages belonging to the zemindars I find in the proceedings of the Magistrate expressions such as I am about to quote. The proceeding commenced by saying—"I find from the records of this office that there exists, and has for some time past existed, a dispute likely to lead to a breach of the peace between Amrito Nath Jha, of Khonte, on the one hand, and Syud Ahmed Reza and Syud Inayet Hossen, the zemindars of Soorajapoor Pergunnah, on the other, regarding certain 'milk' or rent-free lands which Amrito Nath Jha claims as belonging to him, whilst the zemindars entirely repudiate the said claim, alleging that the lands are 'mal,' and form part of their revenue-paying estates."

Again, he notes as to the points for enquiry :—"In what villages in Soorajpore have mal and milk disputes already occurred between these parties and their partizans? In what villages did Amrito Nath Jha claim milk holdings when he made his statement before Mr. Beames in February and March, 1866, and to what extent? In what villages does he claim milk holdings now, and to what extent?" And once again :—"I am satisfied that a dispute likely to lead to a breach of the peace exists concerning land in the five villages, and to the extent above said; and that it is expedient that the parties to this dispute,

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CRIMINAL RULINGS.

being Amrito Nath Jha, milkdar, on the one hand, and Syud Ahmed Reza and Syud Enayet Hossen, zemindars, on the other, should state their claims to these lands in writing." From these extracts, it seems to me clear that the Magistrate did not conceive himself to be dealing with known and recognized divisions of land, but to claims to certain land in part of villages which Amrito Nath Jha alleged to be milk. And in the same manner the Assistant Magistrate states:—"I am satisfied that a dispute likely to induce a breach of the peace exists concerning lands, in all 1,100 beegahs." From this expression, also, it appears to me that there can be no doubt of his meaning, although in the concluding order the Assistant Magistrate says:—"I therefore declare Syud Ahmed Reza and Syud Inayet Hossen to be in possession of the five gaches:—

Goolgach,	extent	...	...	400	beegahs, more or less
Anundgach	„	...	...	50	Ditto
Gumadiggi	„	...	...	250	Ditto
Boggeshari	„	...	...	200	Ditto
And Baragach	„	...	...	200	Ditto

and so on." I therefore think that he has dealt with portions of villages to the extent named in each case. Now, as to the particular portion of each village to which the order relates, there is no information and no specification whatever. In his judgment in the case, which I have above referred to, the Chief Justice says:—"It appears that the Magistrate never tried the first issue. He called upon Amrito Nath Jha to put in the boundaries of what he claimed, but did not call on Ahmed Reza to put in the boundaries of the land which he claimed. Had he done so, it might have appeared that what he was claiming was part of Kontee. In any case, the Magistrate has not settled what are the lands out of which the dispute has arisen, which led him to believe that there would be a breach of the peace."

Now, it appears to me most manifest that an enquiry, under Section 318, cannot possibly take place unless the subject-matter of the dispute be clearly laid down. How are the parties to be called upon to state their claims? How are they to adduce evidence? How is the Court to examine witnesses when they appear? and, above all, in the event of the contingency arising which is contemplated by Section 319, that is, if the Magistrate should decide "that neither of the parties is in possession, or shall be unable to satisfy himself as to which person is in possession of the subject of dispute, he may attach the subject of dispute until a competent Civil Court shall have determined the rights of the parties." How is he to attach that of which he neither knows the boundaries nor the situation?

It appears to me, therefore, that that omission to specify the subject-matter in dispute is a fatal error in the proceedings. If it were open to us in criminal cases, as in cases on the other side of the Court, to remand the proceedings, and if we were satisfied of the necessity of an enquiry in this case, no doubt we should send the proceedings back to the Magistrate's Court, in order that he might state what the matter in dispute really was, and he might then hold a fresh enquiry. But we have no authority to make any such order. I have already stated that it appears to me that no cause for any enquiry was shown; that there was nothing whatever to show an existing dispute which was likely to induce a breach of the peace; and if there were no such dispute, there can be no legal ground for making such enquiry.

For these reasons, it appears to me that the enquiry was irregular, and that the order is insufficient and erroneous, and must be set aside. I lament extremely that it should be necessary for this Court again to interpose in this matter, and to make an order which has the effect of appearing to interfere with the functions of the Magistrate in preserving the peace of his district; but it is absolutely necessary for us to maintain regularity and correctness of procedure. In all cases where an order under Section 318 has been made with proper attention to form, and is not assailable upon really valid grounds, it is certainly our duty to support the authority of the Magistrate. But where the objections are not technical, but are of a serious nature,

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as they appear to me in this case to be, I think it is our duty to interfere and to set aside the proceedings.

There is another point of view in which the uncertainty of this order, as it appears to me, (as I stated in the course of argument) is likely to have a most serious effect. It might be that, on this order being made by the Magistrate maintaining one party in possession, some one might be charged with the contravention of that order. In that case the most serious difficulty might arise. A person might be charged with having contravened that order in respect of different lands lying within the villages named, but he might be able to say—"I have no means of knowing, and I do not know to what lands the Magistrate's order referred." It would be an extreme hardship that a person should be punished for having contravened an order when he really did not know that he was so contravening it.

Hobhouse, J.—I concur that this order must be set aside, but I do not quite agree with my brother Jackson in all the reasons for which he would set the order aside.

What it seems to me we have to determine in this case is whether there has been in these proceedings, under Section 318 of the Code of Criminal Procedure, an error in the decision on a point of law. I think there has been one error, but I do not think that more than one error has been satisfactorily established. Section 318 declares that—"Whenever the Magistrate of the district shall be satisfied that a dispute likely to induce a breach of the peace exists concerning any land within the limits of his jurisdiction, then he is to proceed under that Section to keep in possession the person who, as a matter of fact, is in possession." It seems to me that these words "shall be satisfied" admit of a very wide discretion; and that if the Magistrate is satisfied on any reasonable grounds, then such satisfaction would be sufficient justification for him to institute a proceeding. Now, in this particular case, the Assistant Magistrate was satisfied by reason of a proceeding of the Magistrate That proceeding set forth that the Magistrate had examined the records of his office, and found that a dispute had existed, and existed at that very moment, that is, some six days before the order of the Assistant Magistrate, as between these two parties Then the Magistrate goes on to say that these disputes existing, certain charges have been made; and by reason of the fact of these charges having been made, he considers that there is a likelihood of a breach of the peace, and therefore he directs the Assistant Magistrate to institute an enquiry under Section 318. I should have held, then, with the Assistant Magistrate, that the proceedings of the Magistrate held after an examination of the records of his office, and declaring that on that examination a dispute was proved to have existed, and exists, was sufficient to prove that such a dispute did exist, that there was a dispute; But the law requires something further. It requires not only that the dispute shall exist, but that that dispute shall be likely to induce a breach of the peace; and here it is, I think, the Magistrate and the Assistant Magistrate, who followed him, were both in error. The Magistrate says that there were seven cases of plunder up to a certain date, and twelve of plunder and other offences after that date, and one of murder; but he goes on to say that in every one of the cases of plunder the cases were either struck off, or dismissed, or found to be false, and that the case of murder was not traced to the particular disputants in this case. That being so, the inference should have been that, although there had been, and there were, disputes in regard to these lands, these disputes did not lead to a breach of the peace; and if they had not hitherto led to such breach of the peace, then, as a matter of course, it was not likely that those disputes would lead to a breach of the peace.

It seems to me, therefore, that neither the Magistrate nor the Assistant Magistrate had any reasonable grounds to suppose that a dispute existed which was likely to lead to a breach of the peace.

But on the other points I somewhat differ from my brother Jackson. It seems to me that when a person sets forth as a ground for impeaching the

legality of certain proceeding that that proceedings is indefinite, and would lead to nothing, he must show that it is indefinite. Now, that does not appear to me to have been satisfactorily shown in this case. I think words have been used by the Magistrate and by the Assistant Magistrate which would lead to some confusion; but, at the same time, I think words have also been used which seems to me to show that both of them, and the parties themselves, had some definite and distinct land in dispute. For instance, the Magistrate says:—"We are not going into anything indefinite, but I will go to some precise thing." He then goes on to declare what that precise thing is. He talks of this village with an extent of (as he calls it) so many beegahs, and so on, with always a distinction, as far as distinction is concerned, between these villages and those that come after, and as regards other villages or portions of villages, I think so and so. Therefore it seems to me that the Magistrate had in his mind something distinct. So also it seems to me that the Magistrate (as pointed out by my brother Jackson) distinctly declares that the decision which is to be given is a decision on the "five gaches" or villages, which seem to be synonymous terms, so far as I can make out. And then one of the parties in his statement made before the Assistant Magistrate talks of the "five gaches" as if they were something thoroughly well known.

I therefore cannot say that, in giving the order, the possession of these "five gaches" should be with a certain party; that the Assistant Magistrate gave an order which was so indefinite as to be incapable of being carried out.

On the other hand, I concur with my brother Jackson that this proceeding must be set aside.

Revision of Proceedings, under Section 404, Code of Criminal Procedure, in the case of Tarineekant Lahoory Chowdhry.

13th November.

Before *Glover* and *Hobhouse*, J. J.

The Magistrate, if satisfied on credible information that a breach of the peace is likely to occur, may call on accused to show cause why he should be bound over, without first confronting him with the person giving the information.

Glover, J.—This application is in the nature of a special appeal, and the only thing to be considered is whether the Magistrate was wrong in law in calling upon the zemindar to give security.

The appellant contends that inasmuch as he had no opportunity of cross-examining Doorga Churn, the party on whose statement the Magistrate proceeded, that statement cannot be considered "credible information" in the spirit of Section 282, Penal Code.

He further contends that, if the information were credible, it did not involve a likelihood of breach of the peace.

Neither of these objections appears to me, to be valid. The words of the law are:—"Whenever a Magistrate shall receive 'credible information,' and it is left for him to decide what is 'credible information.'" Undoubtedly, cases might occur in which this Court would be justified in interfering where the information on which a Magistrate acted was palpably absurd and incredible, but ordinarily the Magistrate's opinion would be final.

In the present case there was Doorga Churn's deposition on oath that he believed his life to be in danger from the ill-feeling of the zemindars, of whom the appellant was the principal.

Tarineekant Lahooree had certainly no opportunity of cross-examining Doorga Churn at the time he made this statement, but he had every opportunity afterwards of clearing himself of the accusation, and tried ineffectually to do so by examining several of the principal zemindars of his district.

Their evidence is very peculiar, and by no means establishes the appellant's innocence; to my mind, it goes rather the other way.

There is nothing, moreover, in the law which makes it imperative on a Magistrate to confront the accused and the accused together, in a case under Section 282; and if he considers the sworn deposition of a complainant to be "credible information," there is no reason why he should not proceed

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upon it. The Appellate Sudder Court have, I observe, recorded a similar opinion (12th September, 1862). With regard to the second objection, the words of the Section are:—"Or to do any act which may probably occasion a breach of the peace;" and as the Magistrate believed Doorga Churn's statement that he was in fear of his life by reason of the appellant's enmity to him, he was undoubtedly justified in considering that there was a likelihood of a breach of the peace.

I think, therefore, that there has been no error in law in the Magistrate's proceedings, and that this Court cannot interfere.

Hobhouse, J.—The information given on solemn affirmation by the complainant in this case was believed by the Magistrate, and was therefore, in my judgment, "credible information," sufficient, under Section 282, to entitle the Magistrate to call on the present appellant to show cause why he should not enter into recognizances under the Section.

And there was, I consider, sufficient legal evidence to satisfy the Magistrate, under Section 287, that there was occasion to bind over the appellant to keep the peace. I agree therefore with my brother Glover in considering that there is no ground shown for interference with the Magistrate's order.

PART VII.

REVENUE CIRCULARS.

DECEMBER, 1867.

A. GROTE AND E. T. TREVOR, ESQRS.

No. 6.

The Government having, in the orders on the Report on Wards' Estates for 1865-66, noticed the liability which Collectors incur by not tendering payment of rents due from Wards' Estates to superior landlords as such rents fall due, the special attention of District Officers is called to the Ruling of the High Court in the case of Ranee Surat Soondry Dabea *vs.* The Court of Wards, which will be found at page 57 of the Selected Rulings of the High Court in Rent Suits for 1866. Officers acting in the capacity of the Court of Wards should not wait for the rent to be demanded, but should tender payment at once as the rent falls due.

No 7.

The following should be added to the note to Rule 2, Section III, Chapter X, page 161, under "from 20 years upwards."

Under no circumstances of ordinary zealous duty will more than six months' pay as gratuity, on discharge, be given to men not entitled to pension, whose service is less than 40 years.

2. The above is to be regarded as a standing rule, and no recommendations should, in future, be made which are not in strict accordance with it.

3. The Government Order on which the Rule is based is annexed :—

From Colonel H. W NORMAN, C B., Secretary to the Government of India, Military Department, to the Secretary to Government, Bombay, Military Department, (No. 623, dated Simla, the 25th October, 1867.)

SIR,—I am directed to acknowledge the letter from your Office, No. 3001, dated 28th August, 1867, recommending that, in consideration of the long service performed by Mahadoo Pandoo, Tindal of the Fire Engine Department at Mulligaum, he may receive, on his discharge, a gratuity of twelve months' pay.

2. In reply, I am to acquaint you, for the information of the Right Hon'ble the Governor in Council, that the highest gratuity allowed by the Regulations in such cases is six months' pay, although, exceptionally, so much as twelve months' pay has been given The Right Hon'ble the Governor-General in Council does not, however, consider it desirable that such exceptional grants should be made, unless under very extraordinary circumstances; and I am therefore to request that, for the future, it may be understood that under no circumstances of ordinary zealous duty is more than six months' pay as gratuity, on discharge, to be given to men not entitled to pension, whose service is less than 40 years. When men have served over 40 years, claims to a higher rate of gratuity may be submitted, but only in cases where the men have performed exceptionally good service of a special nature.

3. I am to request that the foregoing may be accepted as a standing rule, and you will move the Right Hon'ble the Governor in Council to cause

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December.
REVENUE CIRCULARS.
(Continued.)

it to be made known to the Heads of Departments, and to send up no recommendations not strictly in accordance with it.

4. In the spirit of this rule, the Right Hon'ble the Governor-General in Council regrets to be unable to sanction the grant of a higher gratuity than six months' pay to Mahadoo Pandoo.

No. 8.

The following addition should be made to Rule 12, Section XIII, Chapter XI, at page 189, after the words "legally passed" in the 4th line:—

"And refunds in cases of erroneous payment, and of payments on account of lands released by competent authority.

2. Similarly, the words "in cases of erroneous payment, and of payments on account of lands released by competent authority" should be added to the 7th line, from the bottom of page 182, after "in consequence of his orders"

No. 9.

The following is to be added as Rule 10, Chapter XVI, Section III of the Board's Rules at page 236:—

"10. When a judgment is recorded in English, the memorandum to be sent for registration should be invariably drawn up in that language."

No. 10.

It has been ruled by the Government of India, in Order No. 2618, dated 20th November, 1867, "that a license once issued, authorizes the licensee to trade, &c, for the period of the License Tax year, and that it would not be legal to require an additional payment from him for a fresh license on account of a revised assessment during the year."

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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

VOLUME V.

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Special Appeal from Chittagong.

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26th November.
CIVIL JURISDICTION.

CASE 1331 OF 1867.

Sama Soondurry and another, (Defendants) *Appellants*, *versus* Shurrut Chunder Dutt and others, (Plaintiffs) *Respondents*.

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Motee Lall Mookerjee and *Grijasunkur Muzoomdar* for Appellants.
Baboos Chunder Madhub Ghose and *Nulleet Chunder Sein* for Respondents.

The cession of her right by a Hindoo widow during enjoyment to the reversioner is valid.

The interests of the widow become extinguished by the entry of the reversioner; and should he die after such cession *his* heirs will take the property and not the next heirs of the widow's husband, the former owner.

The decision of the Lower Court in this case is erroneous. That Court has held that, although Surrut Chunder, during the lifetime of Hurrosoonduree, who was a Hindoo widow in life enjoyment of the estate, obtained a decree as heir, on the strength of a deed of gift of the estate, still this decree and gift can only stand good during the lifetime of the childless widow Hurrosoonduree. And the decision goes on to say that no gift or sale by a childless widow can remain valid subsequent to her decease; and that, though Surrut Chunder was the heir of Hurrosoonduree's husband, still, as he died during the lifetime of that lady, his heirs can only hold and enjoy the disputed property, under the above deed of gift and decree, so long as he lives, but that after her death they can have no right to it. Now, it appears that Surrut Chunder was, in fact, indisputably the heir of Hurrosoonduree's husband, and therefore the reversioner. It has been repeatedly held by the late Sudder, and by this Court, that the cession of her right by a Hindoo widow during enjoyment, to the heir of her husband, is valid. Among the latest cases upon this point, is that given at page 241 of Marshall's Reports, the case of Rujunee Kant Mitter. That being so, and Surrut Chunder having received a surrender of the rights of the widow, he entered into possession as heir of the husband, and became absolutely entitled to the property, the interests of the widow being thereby extinguished. On his death his heirs took the property, and the heirs of Hurrosoonduree's husband have, therefore, no claim to it. The decision of the Lower Appellate Court must be overruled, and the special appeal allowed with costs.

Miscellaneous Appeal from Moorshedabad.

CASE 334 OF 1867.

27th November.

Kishen Kinkur Ghose and others, (Decree-holders) *Appellants*, *versus* Rajah Burodakant Roy and others, (Judgment-debtors) *Respondents*.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboo Mohineemohun Roy for Appellants.
Mr. Montriou and *Baboos Unnoodapershad Banerjee*, *Obhoy Churn Bose*, and *Opendro Chunder Ghose* for Respondents.

Where the Appellate High Court confirms a decree of the Zillah Court, and awards costs on appeal against the appellant, the original decree remains a decree of the Zillah Court, (a Court not established by Royal Charter) and must be executed within the period of limitation applicable to decrees of such Courts; but the decree for costs in appeal is a decree of the High Court,

The appellants in this case obtained their decree in the Zillah Court on the 25th March, 1862.

That decree was affirmed in appeal by the High Court on the 8th June, 1863, the appellant being ordered to pay the costs of the appeal.

The effect of that decision being, I apprehend, to leave the plaintiff at liberty to execute his original decree within three years from 8th June, 1863, as provided by Section 20, Act XIV, of 1859, and also to give him a decree of the High Court, which he might execute for costs of the appeal within the time limited by law for the execution of decrees of that Court.

The law in force on that subject is the Act above cited, Act XIV of 1859, in which no particular Courts are specified, but the Courts of Judicature in British India are distinguished as Courts established by Royal Charter, and Courts not established by Royal Charter.

The 19th Section of the Act provides for execution of decrees of the Courts established by Royal Charter, and the 20th and 21st Sections provide for the like matter in respect of Courts not so established.

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(established by Royal Charter) and may be executed within twelve years.

The Appellate High Court's decrees are not subject to the same restrictions as to Limitation as those of the Sudder Dewanny Adawlut.

At the time of the passing of that Act, the chief appellate jurisdiction in this country over the Courts in the Mofussil was vested in the Sudder Dewanny Adawlut, which was a Court not established by the Royal Charter, and the decrees of that Court would unquestionably be executed under the provisions of Sections 20 and 21.

At that time the only Court in Bengal established by Royal Charter was the late Supreme Court.

Both these Courts were, in accordance with 24th and 25th Vic. Chapter 104, Section 8, abolished on the establishment of the High Court, which is a Court established by Royal Charter, and which made the decree under consideration.

By the 11th Section of the Act cited, "all provisions then in force in India of any Acts of the Legislature of India which, at that time, were applicable to the Supreme Court at Fort William became applicable to the High Court.

Apparently, therefore, a decree of the High Court, as a decree made by a Court established by Royal Charter, falls under the 19th Section of Act XIV of 1859; and if that Section be regarded as a provision applicable on the 1st July, 1862, it became on that day applicable to the High Court by reason of its establishment.

A doubt at one time occurred to my mind whether the provisions of Section 19, which, when it was passed, undoubtedly referred to decrees of original jurisdiction, should not be still restricted in its operation to such decrees. But I find nothing in the Act of Parliament which discriminates between the different jurisdictions of the Court, so as to warrant any such restrictions. Section 12 does not contain any such matter.

Nor indeed can I see any reason why the decrees of the High Court, on its appellate side, should have a less extended efficacy or vitality than those of the same Court on its original side, the proceedings in both being governed by the Code of Civil Procedure, to which the law of limitation is at least very nearly allied.

It is objected to as an anomaly that, while the High Court has merely inherited the powers of the late Sudder Court in respect of appeals from the Mofussil Courts, and while the Sudder Court was included in the three years' rule, the High Court, which has succeeded to the functions of the late Supreme Court, merely for the purpose of original jurisdiction, should use, for the purposes of what may be called its sudder jurisdiction, a provision applicable to the Supreme Court's decrees in original suits.

But these observations seem to me to rest upon a fallacy. Those who make it assume that the High Court has two parts, of which one represents the late Supreme Court, and exercises its powers, the other representing the late Sudder Court, with the jurisdiction and authority of that Court; whereas, in fact, the High Court is one amalgamated Court possessing and exercising "all jurisdiction and every power and authority whatsoever in any manner vested in any of the abolished Courts." (Section 9, High Courts Act.) And I am of opinion that, when any power vested in the late Supreme Courts can be usefully brought to the aid of the Court acting in its appellate jurisdiction, it would be our duty to exercise such power, otherwise the 11th Section of the Act of Parliament would have been quite differently worded; and it would have been enacted that provisions, applicable respectively to the Supreme and Sudder Courts, should apply according as the Court was exercising original and appellate jurisdiction.

I cannot, therefore, but hold that the plaintiff was entitled to execute his decree for costs of the High Court within twelve years as declared by the 19th Section.

This, however, does not extend to the decree below, which was affirmed by the High Court; and it remains only to consider whether execution of that decree was barred, as the Judge deemed, by the terms of Section 20.

The only proceeding to which the plaintiff could refer us as having been taken by him within three years next preceding the application to execute,

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was the filing of a petition during the proceedings of an appeal to Her Majesty in Council, which was commenced by the defendant, but not prosecuted. The petition set forth that the parties intended to compromise, and asked for a delay, which was granted, and the appeal was afterwards struck off the file on the appellant failing to proceed.

The filing of this petition, it appears to me, cannot be looked upon as a proceeding to enforce the judgment, or to keep it in force, and consequently execution of that decree was properly refused.

The Judge's decision must be modified in accordance with our opinion. We give no costs.

Hobhouse, J.—I agree in the order which my brother Jackson would give in this case. The facts are these:

The petitioners, Kisto Kinhur Ghose and others, were plaintiffs in the Zillah Court, and on the 25th March, 1862, obtained a decree against the judgment-debtors, respondents.

The judgment-debtors appealed to the High Court, but that Court, on the 8th June, 1863, affirmed the decree of the Zillah Court with costs.

The judgment-debtors then commenced proceedings with a view to an appeal to Her Majesty in Council; but these proceedings were not effectually prosecuted before the High Court, and were, therefore, on the 9th May, 1866, struck off in default.

On the 8th April, 1867, the decree-holders, petitioners, applied to execute the decree of the High Court, of date 8th June, 1863, but the Court below has rejected the application, on the ground that execution of this decree is barred by the application of the statute of limitations, Section 20, Act XIV of 1859.

The point taken in special appeal is, that the decree, the execution of which was applied for, was, if not altogether, at least as to costs, a decree of the High Court; that the High Court is a Court established by Royal Charter; and that the period of limitation which is applicable is not the period of three years under Section 20, but the period of twelve years under Section 19 of the Act.

I entertain no doubt but that the decree of 1862 and that of 1863 are two distinct and separate decrees of different Courts. The decree of the High Court of 1863 affirmed that of the Court below, and, therefore, the decree of this latter Court remained in its integrity.

But the decree of the High Court went further; it did that which the decree of the Lower Court could not have done; it directed that the costs incurred in proceedings before itself should be paid by the appellant.

It is very true, as contended by the learned Counsel, Mr. Montriou, that when an appeal is dismissed by the High Court, or any Appellate Court, costs, almost, as a matter of course, follow; but the decree for such costs is not the less—in fact, a decree of the Appellate Court, and the mere circumstance that, under rules of the Code of Civil Procedure, the decree has to be put in execution in another Court, (Section 362) does not alter the character of the decree; it is still a decree of the Appellate Court.

I hold, then, that the decree of the High Court of 1863 is, on the one hand, a distinct decree; but that, on the other hand, it is a decree only for costs of that Court; and the next question is whether Section 19, or whether Section 20, Act XIV, of 1859, contains the law applicable to execution.

The words of Section 19 are as follows:—"No proceeding shall be taken to enforce any judgment, decree, or order of any Court *established by Royal Charter*, but within twelve years, next, after a present right to enforce the same shall have accrued," &c.

And, again, the words of Section 20 are these:—"No process of execution shall issue from any Court *not established by Royal Charter* to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken within three years," &c.

The decree, in this instance, is a decree of the High Court on its appellate side; and the High Court is a Court established by Royal Charter; and it

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follows, within the unmistakeable meaning of words, that the limitation prescribed in Section 19, *i. e.*, of twelve years, is the limitation applicable to the decree before us.

But Mr. Montriou contends that the High Court, on its appellate side, in this particular case, is merely exercising the power which the Sudder Dewanny Adawlut would have exercised; that, when the Act of 1859 was passed, the provisions of Section 19 applied as clearly only to the Supreme Court as the provisions of Section 20 did to the Sudder Dewanny Adawlut; that it follows that the provisions of this latter Section apply now to the case before us; and that to hold otherwise would be to hold that one law applied to one part of what is substantially one and the same decree, and another law to another part.

There can, I think, be no doubt but that, up to the 1st July, 1862, when the present High Court was established, decrees of the Sudder Dewanny Adawlut were governed by the limitation of Section 20, and decrees of the Supreme Court by that of Section 19; and it would seem to follow that, when the present High Court was intended to stand in the place of the Sudder Dewanny Adawlut on the one side, and of the Supreme Court on the other, it could only have been intended that the laws of limitation, which applied to the Sudder Dewanny Adawlut and to the Supreme Court respectively, before they were amalgamated, should apply to the Court which took their places after they were amalgamated.

And to my mind there is a manifest absurdity in the idea that a decree, which, if it had been given by the Sudder Dewanny Adawlut on the 30th of June, 1862, would have been privileged to but three years' limitation, should, because it was given by a Court, under a different name, but which still represented the same Sudder Dewanny Adawlut on the 1st of July, 1852, be privileged to twelve years' limitation.

I cannot, therefore, doubt but that it was the intention of the Legislature that decrees of the High Court, passed in appeal from Courts not established by Royal Charter, should be subject to the limitation prescribed by Section 20 of the Act.

But I think it would be quite unjustifiable in us, sitting as interpreters of the law, to follow what we believed to be the intention of the Legislature, when the terms of the law are directly in conflict with such supposed intention.

And here it seems to me the terms are quite plain. Section 20 is declared distinctly to apply to decrees of Courts "not established by Royal Charter;" Section 19 to Courts "established by Royal Charter." The High Court is a Court established by Royal Charter; the decree before us is a decree of the High Court for costs of that Court.

I hold, therefore, that, inasmuch, as the decree, of date June, 1863, is a decree of a Court established by Royal Charter, and inasmuch as appellants have proceeded to excute it within twelve years, they are in time, and I would set aside so much of the judgment of the Court below as refused appellant's permission to execute it.

CASE 1011 OF 1867.
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Special Appeal from West Burdwan.

Mogun Chunder Chuttoraj (one of the Defendants) *Appellant, versus* Surbessur Chuckerbutty and others, (Plaintiffs) and others, (Defendants) *Respondents.*

Before *Kemp* and *Glover*, J. J.

Baboo Kallee Kishen Sein for Appellant.
Baboos Gopaul Lall Mitter and *Kallee Prosunno Dutt* for Respondents.

Mesne profits are recoverable from the person who enjoyed them, even though he has been in *bonâ fide*

This was a suit to recover mesne profits in certain lands decreed to the plaintiff for the years during which he had been kept out of possession by the defendant, the vendee of the person who had originally ousted the plaintiff.

The defendant pleaded non-liability, on the ground that he had been an

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possession without knowledge of his bad title.

innocent purchaser for value, and had held a *bonâ fide* possession, not knowing of the plaintiff's rights.

Both Lower Courts held the defendant to be liable, but the Judge awarded mesne profits for a period of three years and seven months only, holding the claim for the remainder of the period allowed by the Sudder Ameen to be barred by limitation.

It is now urged before us in special appeal:—

Firstly.—That, under the circumstances, special appellant was not liable for any mesne profits at all.

Secondly.—That if he was liable, it was only for three years, the remainder of the claim being barred.

Thirdly.—That with regard to certain plots of land, the Judge has decreed more than was claimed in the original plaint of the suit for possession.

Fourthly.—That the Judge has miscalculated the costs.

In support of the first objection, we have been referred to a decision of the late Sudder Dewany Adawlut (No. 412, of 1854, Sudder Dewanny Adawlut Report, 1858, page 513) in the case of Ranee Surnomoyee, plaintiff, appellant, *versus* Pertab Chunder Burooah, defendant, respondent, in which it is laid down, generally, that a party in *bonâ fide* possession of land, that is, without knowledge of the defect in his title, is not liable to the legitimate owner for mesne profits.

We have been unable to find, and the special appellant's pleader has not referred us to any later cases in which the same doctrine is enunciated. And although we have great respect for the opinion of the learned Judges who passed the decision, we are not in any way bound to follow it as a precedent.

On the contrary, we are of opinion that from the very nature of the case, "mesne profits" must always be recoverable from the person who has enjoyed them, no matter how ignorant he may have been of the badness of his title. No injury is done to him; he suffers no loss, but is merely required to return what he had no right to keep. He would still have his remedy (supposing him to have been the victim of a fraud) against his vendor; and unless he had bought negligently, and without sufficient enquiry, in which case the maxim of *caveat emptor* would apply, would be able to replace himself in the same position as he was in before his purchase.

If mere *bonâ fide* possession were to excuse a party from payment of mesne profits, the anomaly might very easily arise of the vendee after ouster by the legitimate owner, recouping himself, as regards purchase money, from his fraudulent vendor, and still retaining all the mesne profits he had collected during his wrongful possession, whilst the real owner would be without remedy.

We think that the special appellant was properly made liable for wassilut, and that this objection should be overruled.

Then as to the time for which mesne profits should be given. The plaintiff brought his suit on the 5th May, 1865, or Bysack, 1272, B. S. This claim, for wassilut would, therefore, extend for six years upwards, *viz.*, up to Bysack 1266, B. S. Now, in his plaint, he only claims for three years of this period, *viz.*, for the years 1266, 1267, and 1268, B. S., and cannot therefore be awarded any portion of the mesne profits collected during the year 269, B. S. The Judge has given him wassilut for seven months of that year and this amount must, we consider, be struck out of the account.

This objection is, therefore, allowed, and the Judge's order modified accordingly.

With regard to the third objection, we do not think the special appellant's contention established.

In the original suit for possession, the calculation was made avowedly by guess work, at ten times the annual produce, for the purpose of valuation. And such calculation in a suit, which was not for wassilut, but only possession, cannot fairly be held to bind the plaintiff in this case. In his plaint, in this suit, he demanded considerably more than the Ameen's enquiry found to be due.

As to costs, we think that the proper course for the special appellant to pursue is to apply to the Judge below to amend what is stated to be a mere

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error in calculation, and which can be much more efficiently done by the Lower Court, which is in possession of all the facts, than by this, which is hearing the suit on points of law only.

With the exception, therefore, of the modification above noted, this special appeal will be dismissed. Each party will get costs in proportion to the amounts decreed and dismissed respectively.

CASE 1050 OF 1867.
30th November.

Special Appeal from Shahabad.

Joogulkishore Singh and others, (Defendants) *Appellants, versus* Ooggroo Narain Singh and others, (Plaintiffs) *Respondents.*

Before *Jackson* and *Hobhouse*, J. J.

Mr. R. T. Allan and *Baboos Romesh Chunder Mitter* and *Taruck Nath Sein* for Appellants

Baboos Unnoda Pershad Bannerjee, Mohinee Mohun Roy and *Mohesh Chunder Cowdhry* for Respondents.

The Zillah Judge having admitted a review of a judgment of his predecessor, dating fifteen years back, it was objected in special appeal that he was wrong; *first*, because the previous permission of the High Court had not been obtained as was required by the law before 1859; *second*, because a special appeal had already been heard in the case; *third*, because the appellants had been for twelve years in quiet possession. *Held*, on the first point that the necessity for obtaining previous permission of High Court, before admitting review, was done away with by the Procedure Code, and this removal of restriction applied to suits passed, pending, and to come; *held*, secondly that to bar review the special appeal must have been heard under the new Code, and that a special appeal of the nature allowed, under the old law was no bar; *held*, on the third point that where good cause was shown for delay, the Code imposed no limitation on the admission of a review. Analysis of the old law on this point.

Jackson, J.—The sole question with which we are concerned in this case is, whether the Court below, in admitting to review the judgment in appeal passed by a former Judge in 1848, was wrong in law.

The circumstances are very fully stated by the Officiating Judge, Mr. A. J. Elliot, who, I am bound to say, appears to me to have dealt with the case more carefully, more accurately, and more in accordance with justice than his predecessor, Mr. Birch, who rejected the application for review.

The Judge's competency to admit the review is denied.

Firstly.—Because the previous permission of the High Court had not been obtained in accordance with the law before 1859.

Secondly.—Because a special appeal having been admitted in this case, review is barred.

Thirdly.—Because, more than twelve years having elapsed, during which time the defendants have been in quiet possession, all further proceedings are absolutely barred.

Upon the first of these objections, it was contended that the case was one to which Regulation XXVI of 1814, Section 4, applied, and that as provided in the 2nd Clause of that Section, the Judge, before making any order, was bound to report the matter for the orders of the High Court, and that the order of review made without the previous sanction of that Court, was a nullity.

It was agreed that, although Regulation XXVI of 1814, has been repealed, yet, under the principle of Section 387, Code of Civil Procedure, the present case must be dealt with as a suit pending at the time when the Code came into operation, and therefore governed by the law previously in force, and the case of Joy Kishen Mookerjee *versus* Shib Chunder Banerjee and others was referred to.

S D. A. 1859, p. 1521.

The object of Section 387 was, that no party to a pending suit should have his remedies narrowed, or taken away by a change in the law occurring, while the litigation was yet unfinished; and in the case cited, the late Sudder Court put a wide interpretation on the word "pending," in order to let in a review, which would have been shut out by applying to the case the strict provisions as to time of the new Code. The appellants in the present case, reversing this process, seek to exclude an application for review made under the new Code by applying to the case a law long since repealed, though it was applicable to the suit in its earlier stages, contending, in fact, that the applicant, as an old litigant, is not entitled to benefit by the more liberal provisions of the Code now in force.

It seems to me, however, that Section 387 has no bearing on the question.

I speak, of course, of the proviso contained in the latter part of it. That proviso merely maintains the rights of parties to pending suits, in reference to the procedure of the suits, and does not, in my opinion, affect the enlarged powers

given to certain Courts, or the restraints removed by the Code; whereas, by the law previously in force, the Subordinate Courts could not review their judgments without the permission of a Superior Court. The Code removed that inability, and the removal, in my opinion, extended to suits passed and pending, as well as future.

It was also contended for the respondent that the order made by the Division Bench, dated 30th January, 1866, was a sufficient sanction to satisfy the requirements of the old Law.

I am of opinion that, if such previous permission had been requisite in this case, the order in question could not have been considered in that light. It was not an order based on any report from the Zillah Judge, and it conveyed no direction at all—certainly not leave to review the judgment; it merely drew attention to some errors into which Mr. Birch had fallen, and left his successor free to act upon his own view of the law, and of the requirements of the case.

The next matter to be decided, is whether this review was barred by the previous admission of a special appeal.

In the Section of the Code which relates to the right to make applications for review (Section 376), the words "special appeal shall have been admitted" refer, doubtless, to the admission of a special appeal under the Code itself. It is manifest that, in this case, no special appeal could have been admitted under Act VIII of 1859; and here I am inclined to think the petitioner was entitled to be governed rather by the terms of the old Law XXVI of 1814, *viz.*, "from which decree no further appeal may have been admitted by a Superior Court."

I understand that, in this case, no further appeal was ever admitted by the late Sudder Court, but that the application for special appeal was rejected, on the ground that the Court was not competent to entertain a special appeal upon the facts.

It is material also, in order to apply this restriction fairly, to consider the real meaning of the words.

A "further appeal," as spoken of in Regulation XXVI of 1814, Section 4, Clause 2, included both a special or second appeal described in Section 2, Clauses 1 and 2, of the same Regulation, and also a summary appeal mentioned in Clause 3, Section 3, and by the joint operation of these Clauses the door for a further appeal was much wider open than under the later Laws upon the subject.

And the view of this restriction, taken by the late Sudder Court, was apparently this, and it certainly seems a reasonable view, that when a decision had been confirmed by a Superior Court, it had the effect of a decision of that Court, and was liable to be reviewed by it alone. (*See* Constructions Sudder Dewanny Adawlut, No. 1057, and the case of Bhugwan Dutt Singh, Carrau's Summary Cases, page 42, and Syud Keramut Ali's case *ib*, page 137.) (*See* also Macpherson's Civil Procedure, 3rd Edition, 1856, page 539.)

Now, the special appeal in this case, even if admitted, must have been preferred under Act III of 1843, which was the special appeal law in force down to 1853, when it was repealed by Act XVI of that year. It must, therefore, have proceeded on the ground that the decision was "inconsistent with some law, or usage having the force of law, or some practice of the Courts," or that it "involved some question of law, usage, or practice on which there was reasonable doubt."

The admission or decision of a special appeal upon such grounds would not involve a decision of the Sudder upon the merits, and still less could it be conclusive as to the admission of new evidence not discovered till long after.

I am, therefore, of opinion that nothing in the proceedings in special appeal in this case barred the application for review.

A more formidable difficulty remains in the lapse of time since the original decree of the Judge's Court in the first appeal, the interval between that decree and the application for review being about fifteen and a half years.

At the hearing, Baboo Romesh Chunder Mitter referred us to the case of Kasheenath Bannerjee and others, appellants, decided by the late Sudder Court in 1840. This case, first reported by Mr. Sevestre (1 Sevestre's Cases, page 49),

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is also to be found in Carrau's Summary Cases, page 23; it was there held that the expiration of twelve years barred the admission of an application for review. And the case is noted by Mr. Morley, I Digest, page 528, as being the only one in which it had been so ruled.

There is, however, a *dictum* of Sir R. Barlow to the same effect in the case of Jeeb Lall Mahton, decided in 1852, (Colebrooke's Summary Cases, Sudder Dewanny and Nizamut Adawlut, page 177), also Sudder Dewanny Adawlut 1852, page 1033.

In the case of Kasheenath Bannerjee, the petitioner applied, after the lapse of seventeen years, for review of a judgment passed by two former Judges of the Court, who had themselves rejected a similar application by orders of various dates shortly after the decision. It is not stated on what grounds the new application proceeded, though it seems to have been accompanied by certain documents.

According to the ancient Sudder practice, this petition first came before a single Judge, Mr. Bradden, who "doubted the genuineness of the documents," and also considered that the "transcripts exhibited by the respondents were not good and sufficient evidence for the admission of the review." For these reasons he proposed to reject the prayer, but sent the matter before a second Judge, because it arose out of a previous order of two Judges.

It then came before Mr. Tucker, who called upon the Sheristadars to report whether, in any case, a review of judgment had been admitted after the expiration of twelve years.

The office reported in the negative, and thereupon Mr. Tucker, with the concurrence of two other Judges, held that the undisturbed and quiet possession of the property by the appellants for upwards of twelve years was "a good and sufficient ground to bar the review," and that consequently the Court could not take cognizance of the petition.

This decision is not based on any positive enactment, nor do the Judges give the reasons for their conclusion; but it may be assumed that they applied the rule of limitation laid down in Section 14, Regulation III of 1799, to protect persons in quiet possession for twelve years, and held, to use the words of Baboo Romesh Chunder Mitter in the argument before us, that what bars the suit also bars the review.

And in the case before them, probably the decision was quite reasonable; but if the case had arisen, I presume the Judges of the Sudder Court would also have applied the proviso contained in Regulation II of 1805, Section 3, which declared that the twelve years' limitation should not be applicable to any private claims of right to immoveable property, where the persons in possession should have acquired it by violence, fraud, or any unjust or dishonest means whatsoever.

Now, in these cases, as will be observed on reference to the judgment of this Court in the case of another co-sharer, which was heard before our lamented colleague Shumboo Nauth Pundit, J. and myself on the 9th March, 1863, there was a distinct allegation of fraud, the plaintiff's case being that one Rajcoomar, being jointly entitled to the estate with two brothers, had procured it to be sold as his sole property, had purchased it *benami* through one Pertab Sing, and got it reconveyed to his own grandchildren. The plaintiffs in the first suit, to regain a third share, were the heirs of one brother, and the second and successful suit was brought by the other, a third brother.

II. Hay's Reports, page 311.

The plaintiffs who sued first were unable to lay their hands on any evidence of the joint ownership, as Rajcoomar had managed the property, and so lost their suit. The other brother was more fortunate, and discovered, among the judicial records of the district, distinct admissions in Court by Rajcoomar himself that the property was joint.

In this instance, therefore, clearly there was no quiet possession, in good faith, by the defendants, so as to bar the suit by limitation.

This appears to me to distinguish the present case from that first cited.

In the other case cited, we have merely, as I have said, a *dictum* of Sir R. Barlow. The other Judges (W. B. Jackson and Mytton) proceeded on the

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ground that the petition must be presented in the Court where the first decision was passed, which it was sought to review, and for that reason refused to take cognizance of the application.

These cases, however, were decided upon the law as it stood previous to 1859; and with a new procedure and a new limitation law, it seems to me the question is *res integra.*

The Limitation Act XIV of 1859 is wholly silent on the subject, and Section 377, Code of Civil Procedure, assigns no limit to the time after the expiration of ninety days, at which the application for review may be filed on the stamp paper prescribed for plaints, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay.

In the present instance cause was shown for the delay. The Judge took evidence as to its truth, and after full consideration, decided that the cause had been made out.

He therefore granted the review, and his order on that point is final. We cannot disturb the order made on the subsequent proceedings, unless they are shown to be contrary to law, or usage having the force of law. Can we say that there is any law or usage of equal force which declares that an application for review must be made within twelve years.

I know of none, and I do not conceive it to be the duty of the Courts to impose limits in such matters, which have not been set by the Legislature.

This, it is true, is a case in which the right has been stretched very far, but the responsibility does not lie upon us, and the case is not likely to happen frequently.

For these reasons, after the best consideration which I can give the matter, I am of opinion that the decision of the Lower Appellate Court must be affirmed and the special appeal dismissed, but under the circumstance, I think, without costs.

Hobhouse, J.—I am of the same opinion.

CASES 914, 922, 923, AND 931 OF 1867.

2nd December.

Special Appeal from Dacca.

Gobind Chunder Shaha and others, (Defendants) *Appellants, versus* Meer Ashruf Aly and others, (Plaintiffs) *Respondents.*

Before *Kemp* and *Glover*, J. J.

Mr. R. T. Allan and *Baboo Kallee Mohun Dass* for Appellants.
Baboos Romesh Chunder Mitter and *Otool Chunder Mookerjee* for Respondents.

The limitation applicable in a civil suit to set aside a Magistrate's award of possession under Section 318, Criminal Procedure Code is twelve years from the arising of the cause of action.

These four appeals were heard together, and one decision will govern the four appeals.

The subject of contention between the parties is a chur, which, on inspection of the map, appears to be surrounded on all sides by rivers and doons, none of which are fordable at any season of the year.

The party in possession, when the suit connected with these appeals commenced, was the Shaha party, who are the appellants in No. 914, and the respondents in Nos. 923 and 931. The possession of the Shahas was apparently obtained under an award, according to the provision of Section 318 of the Code of Criminal Procedure.

The land in dispute was claimed by the Meah party, respondents in appeals No 914 and 922, as forming an accretion to Chur Chunda, a Khas Mehal in Zillah Dacca, a settlement of which has been made with them.

The Roy party claimed it as appertaining to Chur Komoria.

The appellants in No 931 base their claim on the same footing as the Roy party.

The result of the litigation below was, that a decree was passed in favour of the Meah party, the land in dispute being declared to appertain to Chur Chunda, Zillah Dacca.

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The points taken by the Shaha, appellants in special appeal No 914, are:—

First.—That the plea of limitation, taken by them, has been improperly decided by the Lower Appellate Court.

Second.—That the Lower Appellate Court has wholly misunderstood the maps filed in the case, inasmuch as those maps do not show that the lands in dispute are in any way an accretion to Chur Chunda.

On the limitation plea, the Judge observes that it is "a technical plea," which can only hold good if it were found that the lands in dispute lie within the jurisdiction of the Magistrate of Zillah Tipperah; but that this was clearly not the case. The Judge held that, as the suit of the Meahs was brought within three years from the date of the order of the Assistant Magistrate at Moonsheegunge, under Section 318 of Act XXV, it was in time.

The Shaha, appellants in appeal No 914, contend that they were put into possession of the disputed lands by the order of the Magistrate of Tipperah, under Section 318, on the 6th September, 1862, and that the suit, not having been brought within three years from the above date, it is beyond time. Clause 7, Section 1, Act XIV of 1859 is quoted in support of this argument.

The Clause quoted refers to orders respecting the possession of property made under Clause 2, Section 1, Act XVI of 1838, or Act IV of 1840. The possessory award in this case, whether we take the order of the Magistrate of Tipperah, or that of the Assistant Magistrate at Moonsheegunge as the starting point, was not made under Clause 2, Section 1, Act XVI of 1838, or Act IV of 1840, but under the provisions of Section 318 of the Code of Criminal Procedure. Clause 7, Section 1 of Act XIV of 1859 is, therefore, wholly inapplicable.

The provisions of Section 318 of the Code referred to differ from those of Act IV of 1840 in many important respects. Under Section 318, the Magistrate must be satisfied that a dispute, likely to induce a breach of the peace, exists, and he must record a proceeding, stating the grounds of his being so satisfied. The Magistrate initiates the case by proceeding under the above Section. Under Act IV of 1840, which has been repealed by Act XVII of 1862, a party, who has been forcibly dispossessed of any land, could complain to a Magistrate under Section 4 of that Act, and obtain summary redress. This remedy is re-enacted in a somewhat different form in Section 15, Act XIV of 1859.

In Section 318 of the Code of Criminal Procedure, no period of limitation is prescribed within which a suit must be brought to set aside the award made under that Section. The limited period of three years prescribed by Clause 7, Section 1 of Act XIV of 1859 is, therefore, inapplicable, and the suit may be brought within the period of twelve years from the time the cause of action arose.

On the second ground, we observe that the map of the Ameen shows that the disputed lands are surrounded on all sides by rivers, and are not accretions, but form an island. But the Judge in his decision states that the disputed lands are attached to the older lands of Chur Chunda on the west side of the river Megna, which river is the boundary between the two Zillahs of Dacca and Tipperah, and that, consequently, the claim of the Shahas, appellants, cannot be held to be good. The Judge has clearly misunderstood the map. Further, the boundaries, as per survey map, do not correspond in every respect with the boundaries, as laid down in the Ameen's map, and to add to the difficulties of coming to a proper decision on the materials before us, the boundaries, as stated in the plaint of the Meahs, do not correspond with either the survey map, or the Ameen's sketch.

The decision of the Judge is so very unsatisfactory, and he has so evidently proceeded on a misconception of the maps, that we have no hesitation in remanding the case, to which appeal No 914 refers, for a clearer decision of the rights of the respective parties under the law of alluvion. The Judge will do well to remember that the Shahas, defendants, appellants, before us,

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are in admitted possession of the disputed lands, and that they are entitled to retain that possession until another party can prove a better title.

With reference to appeal No. 922, in which the Roy defendants are appellants, we observe that the points taken are: That the Judge has entirely overlooked the decree dated the 28th June, 1861, obtained by the Roy party, and that the Judge is under error in supposing that the land claimed by the Meah party is identical with the land claimed by the Roy party, as forming a portion of Chur Komorea, decreed to them in the presence of Government in 1861.

This contention is good. The boundaries of the disputed land, as laid down in the Ameen's map, with reference to certain important landmarks, do not differ materially from the boundaries laid down in the map, according to which the Roy party obtained their decree; and without going to the length of saying that the lands are identical, the decree is clearly an important piece of evidence. It may not be binding upon any but the parties to it; but it is unquestionably a piece of evidence which ought to have been fully considered, and not passed over altogether without comment.

The decision of the Court below is so vague and unsatisfactory, that we remand the whole of these cases for a clear and full decision, again remarking that, as the Shaha party are in possession, the *onus* of displacing that possession by proving a better title is upon the Meah and the Roy party who were plaintiffs below.

The appeal No. 931 is also remanded, as it is admitted that the appellants in that case will stand or fall with the Roy party.

Costs to follow the results.

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CASE 992 of 1866.

Special Appeal from Chittagong.

Shahabooddeen, (Plaintiff) *Appellant, versus* Futteh Ali and another, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *Trevor, Loch, Kemp* and *Macpherson*, J. J.

Baboo Greeja Sunker Muzoomdar for Appellant.
Baboo Nobo Kissen Mookerjee for Respondents.

This case was referred to a Full Bench by Peacock, C. J., and J. S. Jackson, J., with the following orders:—

An under-tenure sold for arrears under Act X will only pass free of incumbrances when the right to sell or bring it to sale for arrears was specially reserved by stipulation in the engagements interchanged at its creation. What classes of ryots are protected in spite of such sale.

Peacock, C. J.—If the sale of the tenure in this case was free from incumbrances, it must also be free from admissions made by the former holder of the tenure, and the purchaser at the sale is not bound by them; otherwise a holder of a tenure might create, by an admission, an incumbrance which he could not create by actual conveyance. It appears to me, however, that a sale of this under-tenure was not a sale free from incumbrance, and that the admission made by the former holder of the tenure in the solehnamah was evidence as against the purchaser of the tenure, and that the decision of the Judge was right. Satkowree Mitter's case (page 626, Sudder Decisions for 1851) seems to me to be a correct ruling. In that case the Sudder Court held that Section 11, Regulation VIII, of 1819, which says that the sale is to be free from incumbrances, applies to sales made under Section 8 of that Regulation. But as there are several conflicting decisions, we express no final opinion in the case, but refer it for the decision of a Full Bench.

Jackson, J.—I concur.

The Judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The plaintiff was an auction-purchaser of a Nowabad talook in Chittagong, called Moonshee Hossein Alee. He purchased under a decree for arrears of rent due in respect of the said talook, from the former holder of the talook to the ijaradar under the Government of the village in which the talook is situate, and which comprises several other Nowabad talooks.

The plaintiff sued to enhance the rent of the defendant who claimed to hold the talook free from further enhancement under a solehnamah granted by the former holder Hossein Alee to the predecessor of the defendant, by which he agreed to take no more rent from the defendant's predecessor than the amount which he, the said Hossein Alee, paid to Government as revenue.

The sale took place under Section 105, Act X, of 1859; and the plaintiff contends that he is not bound by the solehnamah granted to the defendant's predecessor by the former holder Hossein Alee, inasmuch as the talook having been sold under Section 105, Act X, of 1859 for arrears of rent of the talook, was sold free from incumbrances.

The Deputy Collector held that the sale was free from incumbrances, and accordingly assessed the defendant at what he considered a fair rent. Upon appeal to the Judge of Chittagong, the Judge overruled the decision of the Deputy Collector, upon the ground that, although the plaintiff was not bound by the provisions of the solehnamah, still there was a recital in the solehnama that the land had been held for more than twenty years upon the same terms; and consequently he thought that the defendant was not liable to have the rent enhanced in consequence of his having held for more than twenty years upon those terms.

The case came before the 1st Division Bench, who held that, if the sale of the tenure was free from incumbrances, it must also be free from admissions made by the former holder of the tenure, and that the purchaser at the sale was not bound by them; and they remarked that, if the case were determined otherwise, a holder of a tenure might create by an admission an incumbrance which he could not create by actual conveyance. It then became necessary to determine whether a sale of the talook, under Section 105, Act X, of 1859, was a sale of the estate free from incumbrances, or whether it was merely a sale of the tenure subject to any incumbrances which the former holder of the tenure had created.

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Several conflicting cases were cited to the 1st Bench when the case was before it, and, in consequence of these decisions, the case was referred by the 1st Bench to a Full Bench, for the purpose of having the question determined, whether a sale, under Section 105, Act X, of 1859, was free from incumbrances, or whether the tenure in the hands of the purchaser was subject to incumbrances created by the defaulter.

Several Regulations have been referred to. The first is Regulation VII of 1799, Clause 1, Section 15, of which declares that "any zemindar, talookdar, or proprietor, or farmer of land, to whom an arrear of rent may be due from a dependant talookdar, kutkinadar, jotedar, or other under-tenant of whatever denomination, which cannot be realized by distraining the personal property of such under-tenant, and his surety (if he shall have given security) is at liberty, after demanding such arrear from the defaulter and from his surety, if forthcoming, or without any express demand if he have reason to believe that the defaulter or his surety is prepared to abscond, to cause the immediate arrest of such defaulter and his surety in the manner following."

Clause 7 of the same Section provides that, "if the defaulter be a dependant talookdar, or the holder of any other tenure, which, *by the title deeds or established usage of the country*, is transferable by sale or otherwise, it may be brought to sale, by application to the Dewanny Adawlut, in satisfaction of the arrear of rent, and the purchaser will become the tenant for the new year."

By Act VIII of 1835, the power of the Dewanny Adawlut to sell in satisfaction for arrears of rent was transferred to the Collectors of Revenue.

Clause 7, Section 15, Regulation VII, of 1799, to which we have adverted, does not, in express terms, say whether, when a tenure is sold under its provisions, it is sold free from, or subject to, incumbrances which may have been created by the former holder.

Section 8 of Regulation VIII of 1819, by which putnee talooks were recognised, enacts that zemindars, *i. e.*, proprietors, under direct engagements with the Government, may apply in the manner therein pointed out for periodical sales of any tenures *upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure;* and Clause 1, Section 11 of the same Regulation declares that any talook or saleable tenure sold under the rules of that Regulation, for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held.

Clause 3 of the same Section, however, provides that nothing therein contained shall be construed "to entitle the purchaser of a talook or other saleable tenure intermediate between the zemindar and actual cultivators, to eject a khoodkasht ryot or resident and hereditary cultivator, nor to cancel *bonâ fide* engagements made with such tenants by the late incumbent or his representative, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent that a higher rate would have been demandable at the time such engagements were contracted by his predecessor."

So that, although sales of tenures for arrears of rent due on them, made under the provisions of Regulation VIII of 1819, were free from all incumbrances, there was the proviso which protected resident cultivators who held under engagements made *bonâ fide* with them by the former incumbent, provided that, at the time, when the engagements were made, as high a rent was reserved as was demandable at that time.

It is to be remarked that Section 8 applied to the sale of those tenures only upon which the right of selling or bringing to sale for arrears of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. If the engagements contained a stipulation to that effect, then the proprietor might apply to have the tenure sold in the manner

provided by the Section; and by Section 11 the sale was declared to be free of incumbrances.

It was not at that time expressly stated whether a sale of a tenure of the nature defined in Section 8, of Regulation VIII, of 1819, if sold by any other process than that prescribed by Clauses 2 and 3 of that Section, was free of incumbrances created by the former proprietor of the tenure or not, and consequently Regulation 1 of 1820 was passed to clear up any doubt upon that subject.

That Regulation recited that, "whereas it has been omitted to provide in the rules of Regulation VIII of 1819, whether in case the proprietor of an estate paying revenue to Government should desire to bring to sale a saleable tenure of the nature defined in Clause 1, Section 8 of that Regulation for the realization of arrears of rent due thereupon, by any legal process other than that prescribed by the 2nd and 3rd Clauses of the said Section, such sale should be made in the public manner provided for the periodical sales therein described; and whereas it was consonant with justice, and was intended by the said Regulation that, in every case of the sale of such tenures for arrears of the zemindar's rent, the sale should be public for the security of the interests of the owner of the tenure sold, which object can in no manner be duly secured, except the sales to be so made be conducted by an officer of Government in the same manner as the periodical sales provided for by Section 8 of the said Regulation." The following additional rule has accordingly been passed by the Governor-General in Council to take effect from the date of its promulgation:

Clause 1, Section 2 enacted that, "whenever the proprietor of an estate, paying revenue to Government, shall desire to cause any tenure of the nature of those described in Clause 1, Section 8, Regulation VIII of 1819 to be sold for arrears of rent due to him on account thereof, and shall, under any summary process authorised by the general Regulations, have acquired the right of causing such sale to be made, the same shall be conducted, after application from the zemindar, by the Registrar or Acting Registrar of the Zillah or City Court, or in his absence by the persons in charge of the office of Judge of the District, in the mode prescribed by Regulation VIII, above quoted, for periodical sales."

Clause 2 of the same Section enacted that ten days' notice of the sale should be given; and then Clause 3 enacted that "the rules of Sections 9, 11, 13, 15, and 17, Regulation VIII of 1819 are extended to all sales made after the manner herein provided."

So that, whenever a sale of any of the tenures of the nature described in Section 8, Regulation VIII of 1819 took place, whether the sale was made under the provisions of that Section, or under any summary process authorised by the general Regulations, the sale was subjected to the provisions of Section 11, and was consequently free of all incumbrances, except those referred to in Clause 3, and amongst others, the tenures of cultivating ryots who had engagements entered into with them by the former proprietor at rents which were as high as were demandable at the time when the engagements were entered into.

Still the law which rendered the sales free from incumbrances was confined to tenures of the nature defined in Section 8, Regulation VIII of 1819, *viz.*, tenures upon which the right of selling or bringing to sale for arrears of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenure, and did not apply to the other class of tenures described in Clause 7, Regulation VII of 1799, *viz.*, tenures saleable by the usage of the country.

That being the state of the law when Act X of 1859 was passed, it was enacted by Section 105 of that Act "that, if the decree be for an arrear of rent due in respect of an under-tenure, which, by the title deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force."

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That Section in effect incorporated the provisions of Section 15, Regulation VII of 1799, and Sections 8 and 11, of Regulation VIII of 1819; and by incorporating those provisions, it substantially enacted that all tenures of the description mentioned in Section 8, Regulation VIII of 1819 were to be sold free from incumbrances, according to the stipulation of Section 11 of that Regulation. There was no law in force according to the rules of which any tenures other than such as were of the nature defined in Section 8 of Regulation VIII of 1819, *viz.*, tenures upon which the right of selling or bringing to sale for an arrear of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenures, were to be sold free of incumbrances.

Section 105, Act X of 1859, applies not only to the class of tenures specially mentioned in Section 8, Regulation VIII of 1819, but also to those which are transferable by the custom of the country. Those which were transferable by express stipulation, and came within the class defined in Section 8, Regulation VIII of 1819, would be sold free from all incumbrances, except such incumbrances as were described in Clause 3, Section 11 Regulation VIII, of 1819. There being no provision that other tenures not so transferable were to be sold free from all incumbrances, they would, consequently, after the sale, be subject to incumbrances.

There were two classes of tenures saleable for arrears of rent under Section 15, Regulation VII of 1799, *viz.*, those in which the tenure was saleable by the stipulations in the title deeds, and those which were saleable by the established usage of the country. The former only were included in Section 8, Regulation VIII of 1819; and it was only in respect of them that the sale was declared by Section 15 of that Regulation to be free from incumbrances.

The question is, whether the tenure in this case is one which falls within the class of tenures described in Regulation VIII of 1819 or not? No evidence was given as to the terms of the documents under which this tenure was created. It appears to be referred to by the Record-keeper of the Collectorate as having been created in August, 1847.

It appears to the Court that we ought to know whether a right of sale for arrears of rent was specially reserved in the engagements interchanged on the creation of the tenure. If such a right was specially reserved, then coupling Section 105 with the other Sections to which I have referred, the Court are of opinion that the sale would be free from incumbrances. If there was no such stipulation, then it would not be free from incumbrances. We therefore think that the case ought to go back to the Division Bench, by which it was referred to us, in order that it might be ascertained whether the lease contained such a stipulation or not. If it did not contain such a stipulation, the defendant is entitled to the benefit of the solehnamah, and, consequently, the plaintiff's suit must be dismissed. If, on the other hand, the lease contains such a stipulation, then the sale under the decree was free from incumbrance, and the defendant is not entitled to the benefit of the solehnamah.

But the defendant in his defence in this case set up that there was no *bonâ fide* sale of the tenure under the decree of the Court for arrears of rent. He set up that the decree and sale under it were all a pretence and sham, for the purpose of getting rid of the solehnamah. Therefore, if it should appear to the Division Bench that there was a special reservation that the tenure was to be saleable for arrears of rent, then, having been sold free from incumbrance, the case must go back to the first Court, to raise and try the issue, whether or not the decree and sale under it were *bonâ fide* or fraudulent, for the purpose of getting rid of the solehnamah.

The law of this case does not depend merely upon our construction of the Regulations to which I have referred. There are decisions of the Sudder Court upon the construction of those Regulations, which show what was considered to be the law at the time when Section 105, Act X of 1859 was passed.

The principal decision is the case decided by this Sudder Court in 1851 (*see* the decisions of that year, page 626). In that case the Court said:—

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"Clause 1, Section 11, Regulation VIII, of 1819 attaches extensive legal consequences as regards the avoidance of under-leases or tenures to sales made under the rules of that Regulation. Regulation I of 1820 applies the rules of Section 11, Regulation VIII, of 1819 to sales of tenures of the nature of those described in Clause 1, Section 8, Regulation VIII, of 1819, *viz.*, tenures upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. The grantee tenure, referred to in this case, does not come under the above description. The sale of such tenures is made under Act VIII of 1835, under which no powers analogous to those of Clause 1, Section 11, Regulation VIII, of 1819 are conveyed to their purchasers."

That decision was in accordance with the view which we have now taken of the construction of the Regulations prior to Act X of 1859.

In a subsequent case (S. D. A. Rep., 1859, page 389) Mr. Sconce, differing from the other Judges, thought that the decision of 1851 was correct, and therefore upheld it. The other two Judges (Messrs. Raikes and Loch) did not actually dissent; but they said that it was not necessary to decide the point, as it did not arise in that particular case, inasmuch as the certificate of sale expressly stated that it was the rights and interests of the defaulting tenant alone which had been sold. That decision cannot be taken as a decision in affirmance of this view, but only as a dictum of Mr. Sconce in affirmance of the decision of 1851.

Several decisions have been cited to-day as being at variance with the decision of 1851; but, in most of those cases, the point does not appear to have been raised before the Court as to whether the tenure was one which came within the meaning of Section 8, Regulation VIII of 1819 as containing an express reservation of the right to sell or not. At any rate the point was not brought to the notice of the Court, nor was the case decided by the Sudder Court in 1851 referred to.

In one of the cases to which reference has been made from the 3rd Weekly Reporter, Civil Rulings, page 197, the matter was brought to the attention of the Judges; and though the decision of 1851 was cited, they dissented from it, and therefore that case is in direct conflict with the decision of 1851. Mr. Justice Bayley and Mr. Justice Campbell in that decision said:—"On a full consideration of this case, we dissent from the doctrine laid down by the decision of the late Sudder Court in the case of Satkowree Mitter (page 626 of 1851) to the effect that a sale of a tenure under Act VIII of 1835 does not convey the tenure free from all incumbrances, but only the rights and interests of the debtors. Looking to the general policy of the Revenue laws, to the terms of Regulation VII of 1799, Section 15, Clause 7, to those of Regulation VIII of 1819, Section 18, Clause 4, and Act VIII, of 1835, also to the analogy and presumption derived from the re-enactment of those provisions contained in Section 105, Act X of 1859, we think that the sale of a tenure for arrears of current revenue is a good sale of tenure itself, and carries the rights of all interested in it, giving to the purchaser the tenure in the shape in which it was originally created, and destroying all rights of all persons holding either jointly with or under the debtor, or undivided sharers, or sub-tenants not otherwise protected."

Although the greatest respect is due to the learned Judges who decided that case, we cannot concur with them in the reasons which they have given for dissenting from the decision of the Sudder Court of 1851. It appears to us that the case of a tenure, which is not expressly made saleable for arrears of rent by the documents by which the tenure was created, is not governed by the general policy of the Revenue laws, nor saleable free from incumbrances by Regulation VII of 1799.

We have shown that it does not fall within Section 8, of Regulation VIII, of 1819. Act VIII of 1835 merely transferred the power of selling from the Dewanny Adawlut to the Collectors of Revenue. We cannot see what analogy or presumption can be derived from the enactment contained in Section 105 of Act X of 1859. If Act X, of 1859 was a mere re-enactment of the former

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laws, it does not extend the provisions of the old laws to cases which did not fall under them.

Reading Section 105, Act X, of 1859 as enacting that the under-tenures therein described may be brought to sale in execution of a decree for arrears of rent due in respect thereof according to the rules "for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force;" and referring to those laws to which we have adverted as the laws which were then in force, and to the Sudder Decision of 1851, it appears to us that, unless there was a stipulation in the documents by which the tenure was created, providing for the sale of such tenure for arrears of rent, the tenure was not sold free from incumbrances.

It has been argued that Section 105, Act X, of 1859 must have been intended to be a general declaration by the Legislature that all sales, under the provisions of that Section, were to be sales free from all incumbrances. But, if we were to give that construction to the Section, we should have no means of protecting that class of tenants who are protected by the proviso in Clause 5, Section 11, Regulation VIII, of 1819, which was extended to sales under Regulation I of 1820 by Clause 3, Section 2 of that Regulation.

The question which we are determining is not so important now as it was before the passing of Act VIII of 1865 of the Bengal Council; because, by Section 16 of that Act, it is enacted that "the purchaser of an under-tenure sold under this Act shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assigns, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assigns."

That Section contains a proviso in almost the same words as Clause 3, Section 11, Regulation VIII, of 1819:—"Provided that nothing herein contained shall be held to entitle the purchaser to eject khoodkasht ryots or resident and hereditary cultivators, nor to cancel *bonâ fide* engagements made with such class of ryots or cultivators aforesaid by the late incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor."

Section 16, Act VIII of 1865 of the Bengal Council seems to have been enacted for the very purpose of getting rid of the difficulty which has now arisen upon the construction of Section 105 of Act X of 1859. All tenures sold under the provisions of Section 16, Act VIII, of 1865 of the Bengal Council for arrears of rent are sold free from incumbrances, but subject to the proviso in that Section, which is in the same words as that contained in Clause 3, Section 11, Regulation VIII, of 1819.

It has been contended that, by virtue of Act VIII of 1865 of the Bengal Council, the sale in this particular instance was free from incumbrance. But Section 16 applies only to purchasers of under-tenures sold under that Act. The sale of the under-tenure in question was before that Act. That under-tenure was sold under the law as it then existed, that is, Section 105, Act X of 1859.

The case will go back to the Division Bench which referred it, with the above expression of our opinion, and the document by which the tenure was created will be sent for from the office of the Collector for the purpose of being inspected by the Division Bench, who, after inspecting that document, will finally decide the case.

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Receipts for rent, virtually or actually admitted by both parties in the two Lower Courts, cannot be questioned in Special Appeal, though, as a fact, they may not have been proved.

Mohabeer Singh, (Plaintiff) *Appellant*, *versus* Dheeraj Singh and others, (Defendants) *Respondents*.

Before *Seton-Karr* and *Macpherson*, J. J.

Baboo Kissen Succa Mookerjee for Appellant.
Baboo Doorga Doss Dutt for Respondents.

Macpherson, J.—This was a suit for enhancement of rent under Act X.

The only evidence given by the defendant, the ryot, upon whom the chief burden of proof lay, was the evidence taken, and the documents filed, in an old suit instituted and disposed of in 1862.

No objection was taken by any body to the reception of this evidence in the first Court, and the first Court, we must presume, with the consent of all parties, dealt with the case upon that evidence such as it may be, and found for the plaintiff, considering that the receipts for rent which the defendant had filed proved a change of rent within the previous twenty years.

The defendant being dissatisfied with the decision of the Deputy Collector, appealed to the Judge, and, in his written grounds of appeal, expressly relied on the receipts and documents filed by him as showing that the decision of the first Court was wrong, and that the land was not liable to enhancement.

Before the Judge, as before the Deputy Collector, no objection was raised by the plaintiff to the receipts and documents being treated as evidence; and the Judge relying on those receipts, and taking them to be genuine, differed from the Deputy Collector, and considered that the receipts showed no variation. The Judge reversed the decision of the Deputy Collector.

In appeal before us, a Full Bench decision in the case of Kriteebass Mytee *versus* Ramdhun Kharrah, Vol. IV, Wyman's Reporter, page 5, Rent Rulings, is relied on; and it is contended that the whole of the proceedings are bad, and that the decision of the Lower Court ought to be reversed, on the ground that the receipts cannot be evidence, as they have not been proved. I entirely concur in the decision referred to, having been myself one of the members of the Full Bench. But the present case is not one which falls within the ruling of the Court in that case at all, for the circumstances are quite different.

These certain receipts, which were treated by the Court of first instance as genuine, in the absence of any proof or objection, were subsequently acted upon by the Zillah Judge, who refused to listen to the objection that they had never been proved, the Judge holding that, because they were not objected to in the first Court, where, under the peculiar circumstances, it was scarcely possible they should have been so. Therefore they had been absolutely admitted.

That is a very different case from one where no objection is taken to the reception of documents in either of the Lower Courts, and they are objected to in this Court for the first time.

Still more it is different from the present case, in which the parties, instead of having the case tried on fresh evidence, consented, directly or impliedly, to have it tried upon such evidence as was offered by the record of a previous suit between the same parties.

It may be that there was no express consent that this case should be tried as it was in the Courts below; but when we find such an unusual course adopted, without remonstrance, as, that the evidence taken in an old case of 1862, is put upon the record, and received as evidence, and as the only evidence in the suit, and no objection is taken even in the Lower Appellate Court, it is impossible to arrive at any other conviction than that the plaintiff consented to rely upon the old suit, and the documents filed in it as the evidence upon which the matters at issue, in this suit, were to be decided.

I am in no way interfering with the principle of the Full Bench decision I have referred to, when I hold that the plaintiff, by the course which he followed, admits these documents as genuine; and that being so, I would dismiss his appeal with costs and interests.

Seton-Karr, J.—I am of the same opinion.

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CASES 1281 AND 1282 OF 1867.

A zemindar, under a decree for rent, sells the tenure of the tenant, his judgment-debtor, and purchases it himself. In taking khas possession, he is opposed, as to a plot of land on which the tenant's homestead stands, by the sons of the former tenant, alleging a possession of over twelve years. *Held*, that the son's rights were not independent of those of the defaulting father, and that the fact of the purchaser of the tenure being the zemindar did not limit his right to khas possession of the entire tenure.

Special Appeal from East Burdwan.

Teellutloma Dabee, (Plaintiff) *Appellant, versus* Brojo Lall Shamont and others, (Defendants) *Respondents.*

Before *Seton-Karr*, *L. S. Jackson*, and *Macpherson*, J. J.

Baboo Otool Chunder Mookerjee for Appellant.
No one for Respondents.

Macpherson, J.—I am of opinion that the appellant in these cases is entitled to khas possession of this land. She is certainly entitled to khas possession of it as against the defaulter who was her judgment-debtor, and whose tenure she sold. The respondents are the sons of the defaulter; and although they may have been in possession for twenty years, they have been so merely as members of the family of the defaulter, and not as having any independent tenure or right of their own.

I think that the decree of the Lower Court should be reversed with costs, and that decrees should be made, declaring the plaintiff entitled to possession of the land as prayed for by her.

Jackson, J.—I agree with my brother Macpherson in thinking that the judgment of the Court below is erroneous.

It appears to me that the plaintiff, having purchased the rights of the out-going tenant, is entitled to be put in possesion of the entire tenure as it stood. That tenure consisted probably of lands of various descriptions: *bastoo*, *ood bastoo*, and other descriptions of land.

It seems to me quite clear that the out-going tenant, whose rights are sold, is not entitled to retain a portion of the tenure while giving up the rest.

The circumstance that the purchaser happened to be also the superior landlord, is, in my opinion, a circumstance that in no way affects his rights; and he is entitled to possession of the entire tenure as any other person would be who had purchased and wished to hold the land under the zemindar. It seems to me that this accidental circumstance is one which has influenced the consideration of the Lower Courts; and they have looked upon the plaintiff rather as the zemindar than as a purchaser.

Seton-Karr, J.—I had such grave doubts as to the course to be pursued in this case, that I requested that it should be re-heard with the assistance of a Third Judge, and accordingly we, who first heard this case argued, have now have the benefit of our brother Jackson's opinion and experience.

It is unfortunate that in such a case, which is somewhat novel in its character, and in regard to which no precedents have been quoted, the respondent has not thought fit to appear and support the judgment in his favor.

It is also to be noticed that in this case no less than three Judges have found in favor of the defendants, and have denied to the purchaser the right which he claims to exercise, *viz.*, that of entering on khas possession, and thus, in all probability, destroying the houses of the defendants. Further, it is remarkable that, out of the whole tenure, which amounts to 84 beeghas, the special appellant admits that he has obtained khas possession of all but a beegah or two on which the houses stand.

After much consideration, and not without considerable doubts as on the subject, I have come round to the opinion that, as a matter of pure and dry law, the special appellant, purchaser of the tenure, is entitled to that which he claims. As I have before stated, no case in point has been quoted; and as far as my recollection serves me, it is not the practice of persons purchasing khoodkhast tenures or other tenures to knock down or destroy the homesteads of ryots actually residing therein.

What the consequences of any such general practice would be, what the feelings of resident cultivators, and what the general effect of legislation if thus practically carried out, I forbear now to discuss or inquire. But feeling that, on this case, as presented to us, and on the finding of the Court, the purchaser has a strict legal right to carry out his decree to the full, and that the Courts

are bound to assist him in his endeavours to carry out that right, I shall not now dissent from the views which have been expressed by my learned brothers, whatever I may think of the hardship of the case of the defendant before us, or of the inevitable hardship to other parties similarly situated, if this practice became general.

The decree of the Lower Courts will be reversed, and this appeal will be decreed with costs and interest.

Special Appeal from West Burdwan.

CASE 1008 OF 1867
28th November.

Mudhooshooden Chowdhry and another, (Plaintiffs) *Appellants, versus* Rammohun Ghur, (Defendant) *Respondent.*

Before *Kemp* and *Glover*, J. J.

Baboo Mohineemohun Roy for Appellants.
Baboos Kishen Succa Mookerjee and *Gopeenath Mookerjee* for Respondent.

This was a suit for a kubooleut.

Tender of a pottah is not absolutely necessary before a suit for a kubooleut will lie.

The Judge held, *first*, that a tender of a pottah was absolutely necessary before a suit for kubooleut could be laid; *second*, that the plaintiff had not proved that the defendant had any right of occupancy, and that, therefore, the suit for a kubooleut would not lie.

On the first ground the Judge is wrong. He is referred to decisions of this Court published at page 72, Vol. I, Wyman's Reporter, and elsewhere.

On the second ground the decision quoted by the Judge is not in point. In that case, the defendant was a tenant at-will, a mere trespasser; and it was held that the plaintiff could eject, but was not entitled to sue for a kubooleut. In this case, the tenure of the defendant has been declared liable to assessment in a decree passed between him and the plaintiff's vendor. The plaintiff in suing for a kubooleut is only carrying out the provisions of that decree.

The real point in the case has not been decided. The defendant urges that, after the resumption suit, he obtained a mokurreree pottah from the plaintiff's vendor which bars enhancement. It is also said that the plaintiff's vendor has admited this pottah. Now it is essential to determine whether this pottah is *bonâ fide*, and whether it protects the defendant's tenure from enhancement. The admission of the plaintiff's vendor, after this suit was instituted, would not be binding on the plaintiff.

The suit is remanded for a fresh decision with reference to the above remarks.

Special Appeal from Dinagepore.

CASES 1431 AND 1509 OF 1867.
29th November.

Syud Gowhur Hossein and another, (Plaintiffs) *Appellants, versus* Ramcomer Chowdury and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. R. T. Allan and *Baboo Debendronarin Bose* for Appellants.
Mr. J. S. Rochfort and *Baboo Chundermadhub Ghose* for Respondents.

Query whether a suit for the delivery of accounts, under Act X of 1859, will lie against the heir of an agent.

Seton-Karr, J.—In these two cases a preliminary objection was taken by Mr. Rochfort, who appeared for the defendants, special respondents, to the effect that a summary suit, like this, under Act X, would not lie against the heirs of an agent, and that the plaintiff's remedy was a suit in the Civil Court.

We have heard the arguments of both parties on this point; and if it were necessary to decide it, we should probably be prepared to hold that suits of this nature would lie against the heirs of the agent, and that the Act intended to facilitate the recovery of accounts by zemindars, and to make the heir of the agent equally responsible with the agents themselves.

This plea, however, was not raised in the Lower Courts; and, on examining the Judge's decision, and their own written statement, I find that the defendants

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broadly denied that they ever had the custody of the accounts, and asserted them to be in the power of the plaintiff. And the Judge, as it appears to me, comes to a finding, not only that there is no proof that the defendants had the accounts, and could produce them, but that it had also been shown that the plaintiffs resided at the Sudder Cutchery, and had the means of obtaining everything for which they now come into Court.

There does not appear to be any misplacement of *onus* of proof or failure of investigation, and I would, therefore, dismiss the appeals with costs and interest.

Macpherson, J —I think, on the fact as found by the Judge, that no case has been made out against the defendants, and that there has been nothing wrong in the manner in which the case has been treated by the Lower Court. The appeals must be dismissed with costs.

CASE 1256 OF 1867.

30th November.

Special Appeal from Tirhoot.

Shoodistee Lall Chowdhry and others, (Defendants) *Appellants, versus* Nuthoo Lall Chowdhry and others, (Plaintiffs) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Bamachurn Banerjee for Appellants.
Mr. R. E. Twidale for Respondents.

Where defendant stated that his orchard was planted more than forty years ago,—*held*, that this was not necessarily inconsistent with the presumption enacted by Section 4, Act X, 1859, unless plaintiff could prove that the orchard had been made since the permanent settlement.

This case must be remanded to the first Court for the trial of the proper issues. The plaintiff sued for a kabolent at an enhanced rate, stating that defendant held some orchard land at Rupees 4 per beegah; that lands of the same kind in the neighbourhood were paying Rupees 20 the beegah; that he had served notice of enhancement on the defendant, and now claimed a kabooleut at the rate so assessed.

The defendant stated that he purchased from the person who planted the orchard more than forty years back; that he, as well as the parties from whom he purchased, had never paid more than Rupees 4 per beegah; and that this rate of rent, dating so far back, could not be enhanced.

The Deputy Collector says that he went to the spot, made a map, examined the holders of orchards in the neighbourhood, who gave the rates of orchard land from Rupees 5-12 to Rupees 10 the beegah, and that he thought Rupees 6 per beegah was a proper rate.

Both parties appealed to the Judge, plaintiff urging the correctness of the rate he sought to impose, while the defendant pleaded that he was entitled to the presumption of having held from the decennial settlement at a uniform rate. The Judge held that the presumption pleaded by the defendant did not arise in the case, as he himself gives the date of the planting of the orchard, *viz.*, more than forty years, which could not, under any circumstances, reach back to the permanent settlement, and he gave a decree for the plaintiff at the rate he claimed.

The defendant filed a special appeal, urging that the plea of having held the land at a fixed rate for upwards of forty years before his purchase, is not inconsistent with the presumption of holding from the time of the permanent settlement, and his pleaders quote the decisions of this Court reported at Vol. V, Revenue, Judicial, and Police Journal, page 9; (or Vol. III, Weekly Reporter, page 133;) Vol. V, Revenue, Judicial, and Police Journal, page 189; (or Vol. IV, Weekly Reporter, page 25, Act X Rulings,) to show that it is not necessary to plead uniform payment of rent from the decennial settlement to raise the presumption mentioned in Section 4, Act X, of 1859, the words of which are—"Whenever, in any suit under this Act, it shall be proved that the rent at which land is held by a ryot in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some

later period." Now, in this case, the defendant's plea of uniform payment for more than twenty years does not appear to be questioned by the plaintiff, and the presumption allowed by the law is not removed by the defendant's statement that the orchard was planted more than forty years ago, for the terms are general; and it was for the plaintiff to rebut the presumption thus raised by proving the orchard to have been made since the permanent settlement. The case will be remanded to be disposed of with reference to the above remarks.

Special Appeal from Hooghly.

CASE 864 OF 1867.
2nd December.

Ramjadoo Gangooly, (Plaintiff) *Appellant, versus* Luckhee Narain Mundul, (Defendant) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Baboos Onocool Chunder Mookerjee and *Anund Chunder Ghosal* for Appellant.
Baboos Sreenath Dass and *Mohineemohun Roy* for Respondent.

Rent receipts must be proved even if not impeached.

A variation in the amount shown in the receipts is *primâ facie* evidence of the rent not having been uniform. The ryot may, however, explain away this by evidence.

Copies of pottahs, and of jumma wasil bakee papers, should be proved by the best evidence; their being attested or authenticated is not sufficient to warrant their being admitted by the Court.

In this case plaintiff sued defendant for arrears of rent at enhanced rates on a specified area and jumma.

Defendant denied his liability for enhanced rates, or for the tenure specified by plaintiff. Defendant averred that he held one jumma of 27 rupees 7 annas; another of 13 rupees 12 annas 17 gundas 2 cowries; or a total of 41 rupees 3 annas 17 gundas 2 cowries, and had uniformly paid at those rates.

The first Court held that plaintiff had not proved his case by his jumma wassil bakee papers; that defendant had filed dakhilas for twenty years, to which no special objection was taken; and that from these and the defendant's oral evidence, it was shown that defendant had paid at fixed rates, so as to exempt him from liability to enhancement. The first Court accordingly dismissed plaintiff's suit.

On appeal, the Lower Appellate Court also decided in favor of defendant. The Lower Appellate Court remarked on the dakhilas that it "did not find that they by themselves absolutely proved that the rent has not varied during the last twenty years;" still the aggregate amount approached to nearly the sum stated by the defendant; and it would seem likely that the difference *may* arise from short payment, one year being made up the next, and so on.

The Lower Appellate Court held, too, that inability by a defendant to prove the precise amount of rent did not vitiate the presumption that the rent had not changed, and that evidence, direct or indirect, would suffice to prove that the rent had been uniform. Kullyanee Debee's case, February 11th, 1865, was cited by the Lower Appellate Court to support the former proposition, and Radhanath Sikdar's case, 2nd August, 1865, to support the latter.

The Lower Appellate Court also relied on an attested copy of a pottah of 1166, and an attested copy of a jumma wassil bakee of plaintiff's of 1266, and added "the defendants have also witnesses."

On the whole, the Lower Appellate Court considered that defendant had proved uniform payments, and that plaintiff had not proved a variation, or even defendant's tenure to be as stated by plaintiff, and that, therefore, defendants were exempt from liability to plaintiff's claim to enhance.

On this plaintiff appeals specially, urging that the dakhilas relied on are not shown to contain that evidence of rent being uniform, which is required by law to give defendant the benefit of the presumption referred to in Section 4, Act X of 1859, and they are not proved by any legal evidence at all; that the copy of the pottah of 1166, and of the jumma wassil bakee of 1266, without further proof, should not have been relied on by the Lower Appellate Court; and that the Lower Appellate Court was further in error in law in stating that plaintiff had failed to prove defendant's tenure under plaintiff, when defendant himself admitted two jummas to be so held.

After hearing the Counsel on both sides, and a reference to the record, we think that the case must be remanded to the Judge to find clearly whether the dakhilas are proved to have been given to defendants by plaintiffs; and if so, whether they show by themselves any legal evidence in support of

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them that the rent has been uniform. It is quite insufficient for the Judge, while admitting a variation in these dakhilas, to state that it may arise from short payments in one year being made up by full payments in another, without that specific fact being fully proved. The variation is *primâ facie* evidence of the rent *not* being uniform. But it may be shown by defendants that this is not so. Further, the Lower Appellate Court seems to have adopted the erroneous view of the first Court that dakhilas, if not positively denied, need not be proved. They, like other documents propounded by parties, must be shown to be what they purport to be. The most recent decision of a Full Bench, 2nd August, 1867, (subsequent to the Judge's decision of 21st February, 1867,) clearly lays this down. Nor do we think that the copies of a pottah of 1166, and of a jumma wassil bakee of 1266, can be accepted on the mere fact of their being attested (or rather authenticated) copies. They must be proved by the best and most distinct evidence available.

In this view, we remand this case for re-trial with reference to the above remarks.

Order.—Remand accordingly.

CASE 358 OF 1867.

4th December.

Special Appeal from Tipperah.

Bhyrub Chunder Chand, (Plaintiff) *Appellant, versus* Shaikh Khuleel and others, (Defendants) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Baboos Kally Mohun Dass and *Otool Chunder Mookerjee* for Appellant.

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Respondents.

Jurisdiction of the Revenue Courts where questions of title arise between intervenor and plaintiff. The importation of such a question into a rent suit by the Deputy Collector himself may shift the Court of Appeal from Collector to Judge, but can give the Judge no jurisdiction to try such a point in the case so instituted. He too must confine himself to the questions of fact, *viz.*, whether the rent was *bonâ fide* received by intervenor. This *bonâ fides* is an essential point for enquiry.

Bayley, J.—Plaintiff in this case, as farmer on the part of one Doya Moyee, sues defendant, a ryot, for arrears of rent.

Defendant pleads that he does not pay rent to plaintiff, but one-half to one Shamasoonduree, and the other one-half to Fazal Kurreem.

Shamasoonduree intervenes and supports this statement, and pleads that Doya Moyee is not a real, but a nominal, proprietor only, her interests having gone one-half to Shamasoonduree, the widow of Doya Moyee, son of Ramkishore, and one-half to Jogul Kurnee, another son of Doya Moyee.

The first Court (the Deputy Collector) held that it was established that there was no title on Shamasoonduree, as she and Jogul Kurnee "duly recorded their consent to the arrangement made under the deed of lease, and this fact was also otherwise proved."

The Deputy Collector further held that, under the peculiar circumstances of this case, no special enquiry was necessary as to actual receipt of rent, as Doya Mooyee's receipt of rent was tantamount to the same by plaintiff, the farmer.

The Deputy Collector gave plaintiff a decree, not for the total amount he claimed, because plaintiff was not able to prove that sum, but for the amount admitted by defendant.

An appeal was laid before the Collector; but it was held on special appeal to the High Court that the decree of the Deptuy Collector being on title, and not on actual receipt of rent, the appeal could lie only to the Judge.

The Judge has now tried the appeal. He held that, under the circumstances of this case, the question of title, as well as of actual receipt of rent, was to be tried; and, to use the Judge's own words, he was "of opinion that on both questions the decision must be against plaintiff, respondent."

The Judge held, *first*, as to right, that certain Civil Court decrees and other evidence clearly showed that, although Doya Moyee's name still was used in connection with the estate left by her husband, still she, in fact, was proved to have parted with her interest in it to the husband of Shamasoondurree and to Joogul Kurnee, and to have no interest left.

The Judge further found on the evidence that Shamasoonduree was not proved to be really a consenting party to plaintiff's pottah as alleged by plaintiff.

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As to the receipt of rent, the Judge held it to be proved as a fact by the evidence that Shamasoonduree's husband and his brother Joogul Kishore, collected the rents together during the husband's lifetime, and that Shamasoonduree collected her share after his death.

Plaintiff appeals specially, urging—

That the question of actual receipt of rent does not so much arise, as the point whether Shamasoonduree, having admitted her signature to the pottah, has proved (as it was in such a case upon her to prove) that she received rents in good faith, as laid down in Section 77, the only Section which could apply.

It is clear from its terms that Section 77 does require proof, not only of actual receipt of rent, but of the same in good faith. Here is a pottah purporting to be genuine, authentic, and in good faith, and so *primâ facie* good evidence. But Shamasoonduree's statement is "the Omlah, with deceptive concealment of the real state of facts caused my signature to be affixed to the pottah." That statement is, in fact, that Shamasoonduree gave the pottah, but in giving it was deceived. She has, therefore, by the rules of evidence, to prove this special plea of fraud. But no such evidence is given by her; so she can have no decree. The case must, however, go back to be tried between the plaintiff and defendant ryots.

Remanded accordingly.

Phear, J.—I consider with Mr. Justice Bayley that the judgment of the Lower Appellate Court is obnoxious to the objection made to it on special appeal. As the case is attended by somewhat special circumstances, I desire to give the grounds on which my opinion rests. It seems to me that the questions, which it was incumbent upon the Judge below to decide, were no other than those relevant to the matter in dispute between the parties as they stood in the Court of first instance; and there, undoubtedly, the only issue between the plaintiff and the intervenor was one of fact, namely, whether the latter had actually, and in good faith, received the rents before and up to the commencement of the suit. No other issue than this could arise between these two parties, and, by the nature of the case, the determination of the intervenor's claim on this issue was preliminary to any consideration of the suit between the original parties. It is true that the statute, under the interpretation which it has received, makes the Court of Appeal, to which resort must be had from the decision of the Deputy Collector, vary accordingly, whether that decision determines a question of law between the parties or not. Were the matter *res integra*, it might, I think, be reasonably argued that the question of law contemplated by the Legislature in this enactment were only such as are properly incidental to the suit, and did not extend to any which the Deputy Collector might by caprice or error introduce into his judgment. This would seem to be the force of the word "determine;" and indeed one would be prepared, *á priori*, to find that the Legislature had made the jurisdiction of the Appeal Court depend rather upon the matters properly put in issue by the written pleadings of the parties, than upon other elements to be furnished by the judgment of the Court of first instance; and if this view were correct, it would follow that, inasmuch as nothing but a question of fact can arise between the plaintiff and the intervenor, therefore no view, which the Deputy Collector should form and express as to the rights of these parties relative to each other, would effect a shifting of the Court of Appeal. However, I believe that this Court has ruled otherwise, and accordingly in this case a Division Bench having come to the conclusion that the Deputy Collector determined a matter of title (which of course was not properly in issue before him) between the farmer and Shamasoonduree, declared on an interlocutory application that the Judge's Court, and not the Collector's, was the proper Court to which the plaintiff should carry his appeal. To the Judge's Court, therefore, the appellant went. The Judge, on the case coming before him in this manner, seems to have thought that the wrongful assumption by the Deputy Collector of jurisdiction to try a matter of title between the plaintiff and the intervenor had the effect, under the statute, of giving him, (the Judge) on appeal, a real

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jurisdiction to try and determine the same. In my opinion this is an error. As I have already said, the occurrence of the matter of title only shifted the Court of appeal; it did not change the character of the subject litigated between the several parties. Therefore the Judge ought to have set himself in the first place to consider and determine the issue of fact between the plaintiff and intervenor, without allowing himself to be influenced by any reference to the title of plaintiff, even as against the intervenor. This issue involved the inquiry, not only as to whether Shamasoonduree had actually received rent, but also whether she had received it in good faith. The Judge appears to have contented himself with pursuing the first branch to an affirmative finding. He did not enter upon the other. Now, it is admitted by Shamasoonduree herself in her written statement that her name was put to the plaintiff's farming lease by an agent possessing authority from her, although, at the same time, in order to do away with the effect of the signature as against herself, she asserted that the authority had been obtained from her by the fraud of some one whom she did not name. Her admission of the signature, notwithstanding the qualification with which it is accompanied, furnishes *primâ facie* evidence in favor of the plaintiff. Assuming then that she has, in fact, collected the rent, it is incumbent upon her to show by evidence how she could have done so in good faith, after she had signed a lease, granting to the plaintiff the right to the same rent. This burden she might discharge by making out fraud on the part of the plaintiff in regard to the lease or ignorance on her side of the true character of the document, of which she had authorized the signature. It appears, from an examination of the record, that no evidence, tending in either of these directions, was ever adduced by the intervenor; and in the absence thereof I think the Lower Appellate Court was bound to give effect to the *primâ facie* case of the plaintiff, *viz.*, to find the issue as to the good faith against Shamasoonduree. I would therefore reverse the decision of the Lower Appellate Court, and affirm that of the first Court, so far as concerns the issue between the plaintiff and the intervenor. In this view, inasmuch as the Lower Appellate Court has not given a decision upon the merits of the issue between the plaintiff and the ryot defendants, it becomes necessary to remand the case for this purpose, and I would remand it accordingly.

CASES 693, 694, 695, AND 696 OF 1867.

4th December.

Special Appeal from Backergunge.

Mr. D. Panioty and others, (Plaintiffs) *Appellants, versus* Mussamut Parbutty Chowdhrain, (Defendant) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Baboo Kishen Succa Mookerjee for Appellants.
Baboo Romesh Chunder Mitter for Respondent.

A sharer in an estate brought a suit for enhancement, and got a decree in the Lower Courts. The other co-sharers then sued making this decree a material point in their cause of action, and they too got decrees. Subsequently the High Court reversed the first-mentioned decree, and declared the tenure not liable to enhancement. The tenant then applied to Lower Appellate Court for review in the cases brought by

The material facts surrounding these four cases are as follows:—A three-anna sharer in certain property brought a suit for enhancement, and succeeded in the Lower Court. This suit may be conveniently termed suit No. 1.

After the termination of this suit in the Lower Court, the other co-sharers in the same property brought two like suits for enhancement, four of them joining as plaintiffs in one suit, and one suing alone, all basing their rights on the judicial determination in their co-sharer's suit No. 1, namely, that the tenure was liable to enhancement. In these suits, calling them Nos. 2 and 3 respectively, the plaintiffs were successful.

Suit No. 1 was carried by appeal to the High Court; and while it was pending, the plaintiff in No. 3, in three successive years, brought as many suits, each for a year's arrears of rent, on the footing of the enhancement, for which she had obtained a decree. These are suits Nos. 4, 5, and 6. The plaintiff was successful in all three.

After this, the decision of High Court was given in suit No. 1, declaring that the tenure was not liable to enhancement; and then the defendants in suits Nos. 2, 3, 4, 5, and 6 asked for and obtained reviews in their several

suits. These reviews constitute the four cases now brought before us. At the hearing of the reviews, the Lower Appellate Court received the judgment of the High Court in suit No. 1 as evidence against the plaintiffs, and upon the strength of it, together with the other evidence already given, reversed his former decisions, and dismissed the four suits under consideration.

The plaintiffs now appeal specially, each urging that the judgment of the High Court, given as it was in a suit to which they were not parties, was not admissible as evidence against them, and that the Lower Appellate Court was therefore wrong in attributing any weight to it.

We think that it is not now open to these parties to make this objection. In the Court of first instance, and in the Lower Appellate Court before review, they not only appealed to the judicial determination of the suit No. 1 as evidence in their favor, but even embodied it in their respective plaints as being a material particular of the cause of action which they proposed to establish. They expressly invited the Court to consider that determination, and desired it to be influenced thereby. We are of opinion that the Lower Appellate Court committed no error of which the special appellants can justly complain when it complied with their request, and allowed itself to be guided by the determination to which its attention had been thus invoked. It makes no difference that the final decision of the Lower Appellate Court was come to on review, because the proceedings in review, when once allowed, are but a re-opening of the first hearing. And clearly the circumstance that the judicial determination of suit No. 1 had been corrected by the decision of a higher Court during the interval between the first hearing and the review could not have the effect of withdrawing from the record those words of the plaintiffs which had, in effect, asked that that decision should be treated as an authority in regard to their claim against the defendants.

the other co-sharers, and the Court admitted the reviews, and reversed its former decisions. *Held*, that the co-sharers could not object to the decision of the High Court on the appeal in the first case being treated as conclusive, when they themselves had made the original decree in that case the material ground of their claim.

The special appellants in Nos. 693 and 695 further objected before us that, inasmuch as the suits in these cases were, as they alleged, decided *ex parte* in the Court of first instance, because the defendants did not appear, therefore no appeal lay from these decisions, and consequently the hearing of the cases by the Lower Appellate Court was held without jurisdiction. On reference to the record we find that this objection is made upon a mis-impression of facts, for we find that in each of these cases the defendants filed written statements, and their pleaders were examined by the Court.

Neither ground of the special appellant's objection is therefore made out, and we accordingly dismiss the four special appeals with costs.

Regular Appeal from Bhaugulpore.

CASE 161 OF 1867.
5th December.

Gridharee Sing, (Plaintiff) *Appellant, versus* Mr. M. Collis, (Defendant) *Respondent.*

Before *Kemp* and *Glover*, J. J.

Mr. R. T. Allan and *Baboos Unnodapurshad Banerjee* and *Hemchunder Banerjee* for Appellant.

Baboo Ummur Nath Bose for Respondent.

This was a suit, under Act X of 1859, by the proprietor of mouzah Rampore Bhalkhoora, to cancel a theeka pottah granted to the defendant Collis on two grounds: *first*, that there had been a default of three kists or instalments of rent; and, *secondly*, that the theekadar had given a sublease to the Tulsia Factory, both proceedings being contrary to stipulations in the pottah, and rendering the same voidable.

The defendant denied that any rent was due, inasmuch as it had been paid to the plaintiff under decrees of Court obtained by him. She admitted the sublease to Tulsia Factory, but argued that a subsequent arrangement entered into by her husband Collis and by her father Christian with the zemindar had altered the simple lease into a zuri-peshgee mortgage, and that the terms of the lease were not therefore binding.

The only intervenor recognised by Act X is one who claims the right to receive the rent as landlord. A party to whom the rents payable under a lease are assigned to liquidate a loan cannot intervene under Act X. A mere advance of rent to be credited in the last year of

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the lease does not change such lease into a mortgage.

Mr. Christian was not made a party to the suit by the plaintiff, but the Deputy Collector, considering that his interests were largely involved, inasmuch as he had lent Rupees 45,000 to the plaintiff on the security of the rents of the mouzah leased to Collis, allowed him to be made a defendant.

On the whole case, he found that the lease to Collis, as well as the agreement with Christian, were both of the nature of mortgages, and the suit was not therefore triable under Act X of 1859. He referred the zemindar to a regular suit.

After hearing the pleaders on both sides, we are clearly of opinion that the Deputy Collector was wrong.

And first as to his allowing Christian to be made a party to the suit.

Section 77, the only Section of Act X of 1859, which provides for intervention, expressly states that the intervenor must be one who claims the right to receive the rent, to be the landlord in fact; but Christian did not do any thing of the kind. His objection was that Collis's pottah could not be cancelled, because he had a lien on the rents. He admitted the zemindar's title to receive the rents under ordinary circumstances, and merely contended that they had been assigned to him under a special agreement.

Now, Act X does not provide for an intervention of this kind, and we think that the Deputy Collector did wrong in making Christian a party to the suit.

The case of Jogendur Chunder Ghose, plaintiff, appellant, Vol. IV, Wyman's Reporter, page 13, Rent Suits, takes a similar view of the law.

Then as to Collis's agreement with the plaintiff. It is admitted that the pottah itself is a simple theeka lease, with nothing in it that can support the defendant's contention that the arrangement between him and the zemindar was really a mortgage.

But it is contended that an ikrar given by Collis, and another given by Christian, which were filed by the plaintiff, when read together, show that, whatever the arrangement might have been under the pottah, it was altogether altered by the ikrars. From these documents, it appears that Collis advanced Rupees 3,000, which he was to get credit for in the rent of the last year of his lease, and that Christian lent to the plaintiffs Rupees 45,000, which, with interest, was to be paid off by the rents of the theeka lease.

We do not see how these ikrars in any way alter the original lease. As to Collis's advance, it is the commonest thing possible in the Behar Provinces for a landlord on giving a lease to demand an advance of moneys which are to be credited to the lessee in his accounts as rent. The sums so taken are considered as security for the payment of the rent, and the fact that the money is always credited by the last year's rent, shows the meaning of the custom, which is that, in case of a tenant's absconding during the term of his lease, the landlord may have this sum at least to fall back upon. We have met with many cases of this description, but never one in which it was contended that such an advance changed the lease into a mortgage.

Then as to Christian's ikrar. The respondent's pleader laid much stress on the word "bhurnanamah," which was found at the end of it. But on reading the entire document, it seems perfectly clear that what was done was to assign the rents of the theeka lease in payment of the loan, so long as that loan remained unpaid. The zemindar had the right to pay off the debt at any moment, and had neither possession of the mouzah, nor anything to do with collecting its rents. The money which ordinarily would have gone to the proprietor he received from the tenant, and then his connection with the lease ended.

There is no presumption even in favor of the transaction with Christian being a mortgage.

There is no suggestion that it was a benamee affair by Collis for Christian. And so far as the documents go, they show a distinct and separate interest held by each of these persons.

Moreover, supposing Collis to have died, or to have become bankrupt, or in some other way to have defaulted, could it be contended that, under the

terms of the ikrarnamah, Christian could have entered on the property? And if he could not have done that, where was his security in Collis's lease?

And, supposing that the plaintiff had paid off Christian's bond, say in the fourth or fifth year of its existence, could he have taken the lease away from Collis?

From all these circumstances, it appears to us quite clear that the transactions between Collis and Christian were quite separate and distinct, and that there is nothing in the ikrarnamahs to change Collis's lease into a mortgage.

We think, therefore, that the case was triable under Clause 5, Section 20, Act X, of 1859, and that the Deputy Collector should have so tried it. The case is, therefore, remanded for trial.

We go no further into the case than this, and express no opinion regarding Christian's arrangement with the plaintiff, further than to say that it did not, in our judgment, amount to a mortgage on the lands.

Special Appeal from Chittagong.

CASE 1448 OF 1867.
6th December.

Moulvee Shokoor Ally, (Plaintiff) *Appellant, versus* Mussamut Umola Ahalya and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Mr. C. Gregory for Appellant.
Mr. R. E. Twidale and *Baboo Shoshee Bhoosun Bose* for Respondents.

The suit was brought by the putneedar for an abatement of rent on the ground of fraud, in as much as the existence of a certain intermediate tenure, created by the zemindar, was concealed from him when he took the putnee.

In appeal, the Judge has thrown out the case, holding that the terms of Section 18, Act X, of 1859 do not apply to the case; and that where abatement has been allowed to parties in the position of the plaintiff, it has been solely on the ground of the diminution of the tenant's area.

We concur with the Judge in thinking that Section 18, Act X, of 1859 is not applicable to the case, and we have no doubt but that plaintiff might have sued to be relieved of his contract altogether; but we think that the Judge was wrong in considering that the case could not be tried by the Collector. The words of Clause 3, Section 23, Act X, of 1859 appear to us quite wide enough to admit of this case being tried by the Revenue Courts, and the pleaders have been unable to produce any ruling to the contrary. We, therefore, remand the case to the first Court, to be disposed of with reference to the above remarks. The Deputy Collector, after fixing the proper issues, will allow the parties to file any additional evidence they may require, and will dispose of the case as soon as it is ready.

Where a plaintiff, putneedar, sues for an abatement of rent on the ground of fraud, inasmuch as the existence of an intermediate tenure created by the zemindar was concealed from him, when he took the putnee—*held*, that Section 18, Act X, of 1859 is not applicable. The language of Clause 3, Section 23 of the said Act is, however, wide enough to admit of such a case being tried in the Revenue Court.

Special Appeal from Mymensingh.

CASE 1097 OF 1867.
6th December.

Kashee Nath Deb, (Defendant) *Appellant, versus* Moharanee Shibeshurree Dabea and others, (Plaintiffs) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Baboo Mohineemohun Roy for Appellant.
Mr. Mackenzie and *Baboo Romesh Chunder Mitter* for Respondents.

It is argued for the appellant, in this case, that the case ought to be again remanded, upon the ground that the Lower Court has failed to carry out the order passed by this Court in remanding it in July, 1866, and that, after ascertaining whether the notice of enhancement was duly served, the Court should then inquire into the other points arising in the case.

Although the Court has not, upon remand, gone into all the other points arising in the case, we think there should not be a second remand, because, taking the first judgment of the Lower Court, together with the judgment immediately

Where, a notice of enhancement, though informal was sufficient to inform the ryot of the landlord's intention to increase the rent to the rates paid for similar lands in places adjacent, and was accepted by the

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ryot,—*held*, that the objection of informality could not be taken for the first time on special appeal.

before us in appeal, and considering the line of conduct adopted by the appellants, both in the Lower Court and in this Court, it appears to us that the case has substantially been fully tried upon the merits, and that it would, in no degree, serve the ends of justice to remand the case again. We think, however, that, as the first remand was based upon the preliminary objection that service of notice of enhancement had not been proved, the Appellant has a right to take up any of the grounds of the special appeal filed on the first appeal, as well as those filed on the present occasion.

The first of the grounds which has been argued here to-day is, that the notice of enhancement is altogether informal, and that the suit ought to have been dismissed in consequence.

There is no doubt that the notice of enhancement is, in itself, most informal; and if this objection had been taken in time, it might have been a very good reason for the dismissal of the suit. But the objection was never taken until the case came up to this Court in special appeal; and although the notice is informal and indistinct, still it appears to us sufficiently to show that the intention of the plaintiff in giving the notice was to inform the defendant, his ryot, that it was his intention to increase the rent to the rates paid for lands of similar description in places adjacent, under Clause 1, Section 17, of Act X, of 1859. That the defendant accepted the notice, as, under Clause 1, Section 17, it is clear from the course which he followed. Issues were fixed as to the rates prevailing in the neighbourhood, and the case went to trial upon them. We think that, although the notice was very informal, yet, under the special circumstances of the case, it must now be held that it was a sufficient notice under Section 17.

Then it was contended that the decree, as it stands, is a decree for a greater quantity of land than that for which rent was previously paid by the defendant; and that, inasmuch as the notice was not a notice under the 3rd Clause of Section 17, such a decree was bad.

Here again no objection was taken in the Lower Courts to the notice of enhancement on this ground, and the case was allowed to go to trial upon the issue as to what the quantity of land was which was to be assessed at the enhanced rates.

We think the objection, now made on this ground, is made too late, and that the defect, if any, is cured by the objection not having been taken earlier.

On the general finding of the Court as to the rates, and as to the quantity of land, it does not appear to us that there is anything wrong. The Judge has found all the facts against the present appellant, and there is no error of law, so far as we can see, in his finding.

The plaintiff's suit seems to us to have been misconceived throughout, and upon his own statement of his case, as far as we can understand his position, the suit ought to have been a suit simply for a kabooleut, and not for enhancement of rent at all. The form in which the suit is brought has led to infinite confusion and misunderstanding, and the whole litigation has been of the most unsatisfactory description, the plaintiff being the person mainly to blame for not bringing the suit in a proper shape. The defendant is also to blame for not having at once objected to the form in which the suit was brought.

We dismiss the appeal, but, under the circumstances, without costs. Each party will pay his own costs throughout this suit.

Regular Appeal from Nuddea.

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CASE 188 OF 1867.

Brindabun Chunder Chowdhry and others, (Plaintiffs) *Appellants, versus* Brindabun Chunder Sirkar Chowdhry and others, (Defendants) *Respondents.*

Before *Bayley* and *Phear* J. J.

Baboo Onoocool Chunder Mookerjee for Appellants.
Baboos Kishen Kishore Ghose, Mohendro Lall Shome, Bungsee Buddun Mitter and *Bycaunt Nath Paul* for Respondents.

Sale of a putnee tenure under Act X for arrears of rent. Such tenure will only pass free of incumbrances when, in the engagements interchanged at its creation, the right of selling or bringing it to sale for an arrear of rent was specially reserved by stipulation.

Phear, J.—The substantial question in this case is, whether or not, on the sale of the putnee by the zemindar for arrears of rent, the putnee tenure passed into the hands of the purchaser free of the incumbrance upon it, which, in the shape of a durputnee tenure, had existed up to the time of the sale.

It is admitted that the putnee tenure, was. either by the title deeds, or by the custom of the country, transferable by sale, and the sale in question was effected in execution of a decree for arrears of rent which the zemindar had obtained in the Collector's Court, an application and order for that purpose having been made in pursuance of the provisions in that behalf of Section 105, Act X, of 1859. The sale was therefore legally good and valid. What then passed by it?

The words of Section 105, Act X, of 1859 do not expressly say whether only the rights and interests of the judgment-debtor in the tenure are to pass; or whether, on the other hand, the purchaser is to get the tenure free of all burdens. If the Section had been entirely silent on the point, the first of these alternatives would, of course, have been presumed. But this is not strictly the case; the Section refers in certain terms to the rules for the sale of under-tenures "for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force;"* and in the case of Ahabooddeen *versus* Futteh Ali, a Full Bench of this Court has decided that this reference, in effect, incorporates into Act X the provisions of the then existing law with regard to the sale of tenures for arrears of rent.

From this decision it follows that, in the case of the sale of a tenure for arrears of rent effected under Section 105, of Act X, of 1859, the tenure will pass free of incumbrances or not, according, as the same result would have followed, if the same tenure had been sold for arrears of rent under the provisions in that behalf of any law which was in force at the time of the passing of Act X.

Now, at that time, the sale of a tenure could only be free of incumbrances, if it took place in accordance with the provisions of Regulations 8 of 1819. Section 8 of that Regulation, as is observed in the judgment of the Full Bench, points out the conditions under which a tenure may be brought to sale within the terms of the Regulation, and Clause 1 of Section 11 of the same Regulation declares that all such sales (subject to certain exceptions) should be free of incumbrances.

Now, the material condition precedent to a sale being made within the Regulation, as given in Section 8, is, that "the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." If this stipulation did not exist, the sale would not carry with it to the purchaser the benefit of the Regulation. It is essential, then, to the defendant's case that this stipulation should have been made in the engagements interchanged at the creation of this putnee; unless this was so, the title to the durputnee, which the plaintiff has made out, gives him the right to succeed in this suit. But there is no evidence, whatever, on the record to suggest that such a stipulation was made at the creation of the putnee. Therefore I think the Lower Court has committed an error in dismissing the plaintiff's suit.

* Published in the present number of R. C. & C. R.

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The defendants argued before us that the sales referred to by Section 11, of Regulation VIII, of 1819 were not limited by the words of Section 8, but certainly included all the sales for arrears of rent of that peculiar tenure, which is denominated putnee; and, in support of this position, they relied on Clause 2, of Section 3, of the same Regulation. This runs as follows:—

"*2nd.*—Putnee talookdars are hereby declared to possess the right of letting out the lands composing their talooks in any manner they deem most conducive to their interest, and any engagements so entered into by such talookdars with others shall be legal and binding between the parties to the same, their heirs, and assignees, provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrances resulting from the act of his tenant."

But, in truth, the term "putnee," as used in the Regulation, contains, in it self, the very limitation in question; for the preamble of this Regulation, when describing the origin and character of the tenure "usually denominated a putnee talook," and stating the reasons which rendered it necessary to regulate and define the nature of the property given and required on the creation of such a tenure, expressly stated that, by the terms of the engagements interchanged at that time, it is amongst other stipulations provided that, in case of an arrear occurring, the tenure may be brought to sale by the zemindar, consequently, as it appears to me, this argument fails to help the defendants.

In my opinion the decree of the Court below ought to be reversed, and the plaintiff's claim dismissed with costs.

Bayley, J.—I concur in this order, and, in the view that the material point is in this case, that it should be shown that there was the stipulation for the agreement between the parties for sale in the event of arrears. No such stipulation has been shown.

Thus there is an error in the Lower Appellate Court holding that plaintiff's suit should be dismissed.

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When a person makes one statement before the Magistrate, and a directly different statement before the Civil Court, he may be legally committed by the Magistrate on an alternative charge, provided the consent of the Civil Court has been obtained under Section 169, Code of Criminal Procedure to the institution of the charge connected with the statement made in that Court.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Sarun, in the case of Oottum Narain Singh.

Before *Glover* and *Hobhouse*, J. J.

From the Judge's statement on this reference, it would seem that the person committed for trial before him made one statement before the Magistrate, and a directly different statement before the Civil Court.

The Magistrate committed on an alternative charge, having, so far as regards the statement made before the Civil Court, first obtained the sanction of that Court to the institution of the charge connected with that statement.

In so proceeding, we think the Magistrate acted in strict legality.

Section 169 is apparently the only Section under which the Magistrate could have prayed the Civil Court to sanction proceedings, and under which the Civil Court could have accorded such sanction, or could have acted at all.

And when such sanction had once been given, (and the law says it may be given at any time) all that was left was for the Magistrate to proceed to commit or not, as he thought fit.

Queen *versus* Dhoonda Bhooya.

Committed by the Assistant Magistrate of Raneegunge, and tried by the Sessions Judge of West Burdwan, on a charge of Dacoity.

2nd December.

Before *Kemp* and *Glover*, J. J.

The punishment for escape from lawful custody must be in addition to the punishment awarded for the substantive offence.

Contemporaneous sentences are not legal. Where such had been awarded, the High Court separated the sentences making them run one on the expiry of the other. [*Query.*—Enhancing the punishment ?]

Glover, J.—I see no reason to interfere with these convictions. The evidence that the prisoner was one of the dacoits, and took a leading part in the attack, appears to me sufficient and satisfactory.

But I observe that, for the second offence, of which the prisoner has been found guilty on his own confession, *viz.*, escaping from lawful custody, under Section 224, Penal Code, the Sessions Judge has awarded no legal punishment.

The explanation to Section 224 provides, as pointed out by Mr Justice Jackson in his review of the Bancoorah Criminal statements, that the punishment for escape from lawful custody must be "in addition" to any punishment awarded for the substantive offence.

The Sessions Judge has recorded a sentence of two years' rigorous imprisonment for the "escape," but has made it what he calls "conterminous" with the sentence of ten years' transportation for the dacoity; so that, if the prisoner had been acquitted on appeal on the charge of dacoity, he must have been released at once, notwithstanding the sentence for escape recorded against him.

It has been ruled by this Court, on more than one occasion, that contemporaneous sentences are not legal, and I would therefore, under Section 404 of the Code of Criminal Procedure, amend the Sessions Judge's order, and direct that the sentence of two years' rigorous imprisonment under Section 224, Penal Code, be, in addition to the punishment, awarded for the dacoity, and commence after the expiry of that sentence.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Tipperah.

2nd December.

Chamaro Malo and others *versus* Kashi Chunder Lalla and others.

Before *Kemp* and *Glover*, J. J.

What is credible information, such as would warrant a Magistrate in calling

We think that there was no such "credible information," as the law requires, before the Deputy Magistrate, and that he was not justified in calling upon the parties to furnish security under Section 282, Code of Criminal Procedure.

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upon a party to give security to keep the peace? Not a a vague petition unsupported by any complaint or deposition on solemn affirmation

The only ground for his proceedings appears to have been a petition, in which it was stated that the Tipperah Rajah's people were intimidating the ryots.

This petition was not backed by any complaint or deposition on solemn affirmation; nor even did it go the length of saying that there was any probability of a breach of the peace. We do not consider that an unsupported petition like this (a petition, by the way, which was declared after a Police enquiry to be false) can be considered credible information under the Section of the law above quoted, and we, therefore, annul the Deputy Magistrate's order, and direct him, if he still thinks interference necessary, to proceed according to law.

13th December.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of instituting a false criminal charge with intent to injure, &c.

Nobokisto Ghose, *Appellant.*

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. Reed for Appellant.

(1.) Under Section 211, Penal Code, the instituting a criminal proceeding with intent to injure, knowing there to be no just or lawful ground for such, may be treated as an offence distinct from the falsely charging a person with having committed an offence.

(2.) A Police officer, though acting upon the information of an informer, may be said to *institute* criminal proceedings against the person charged by him; and the consent of his superior officer to the course pursued will not guarantee him from the consequences of bad faith.

(3.) The Judge's charge to the jury must not discuss points of law.

(4.) Acts and proceedings of Courts must be regularly proved before admission, and the mere fact that the same witnesses are examined at the present trial does not render their depositions at a former trial evidence, unless put in to contradict them, and they were expressly examined in regard to such.

Macpherson, J.—The prisoner Nobokisto Ghose was tried before Mr. Ainslie, the Sessions Judge of Patna, upon the three following charges:—

First.—Under Section 211 of the Indian Penal Code, that he, on or about the 5th June, 1867, instituted, or caused to be instituted, against one Teluck Singh, a false charge of an offence punishable with transportation for life with intent to cause injury to the said Teluck Singh, knowing that there was no just or lawful ground for such charge.

Second.—Under the same Section, that he, on or about the 5th June, 1867, instituted, or caused to be instituted, a criminal proceeding against Teluck Singh with intent to cause injury to Teluck Singh, knowing that there was no just or lawful ground for such proceeding.

Third.—Under Section 167, that he, on or about the 5th June, 1867, being a public servant, and as such charged with the preparation of a document, prepared that document in a manner which he knew or believed to be incorrect, intending thereby to cause, or knowing it to be likely that he might thereby cause, injury to Teluck Singh. He was acquitted on the first charge, but convicted on the second and third, and sentenced to a year's rigorous inprisonment, and to fine. He appeals to this Court, and the points taken by his Counsel are substantially that Section 211 of the Penal Code cannot be split up, as it has been so as to treat "falsely charging" a person as a distinct offence from "instituting a criminal proceeding" &c.; that a public officer acting as the prisoner did, under orders of his superior officer, cannot legally be prosecuted under Section 211; that the prisoner did not "institute" the proceedings which are the subject of this prosecution; that the Judge misdirected the jury in a manner highly prejudicial to the prisoner; that there was no evidence that the prisoner knew that there was no just or lawful ground for the proceedings which he instituted; that there was no evidence that the prisoner framed the entry referred to in the third count in a manner which he knew to be incorrect, or with the intent or knowledge required to constitute an offence under Section 167. I think there was nothing wrong in charging the prisoner, as he has been charged in the 1st and 2nd counts; for it appears to me to be clear that, under Section 211, "instituting a criminal proceeding" may be treated as an offence in itself, apart from "falsely charging" a person with having committed an offence.

I think also that, supposing the case for the prosecution to be proved, the prisoner would be legally responsible for what he did, notwithstanding that he was a Police officer, and in one sense instituted the proceedings by order of his superior officer; for the case for the prosecution practically is that the prisoner in bad faith, and knowing that he had no just or lawful grounds for instituting

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he proceedings, led his superior officer to believe that he had just and lawful grounds, and so induced the latter to direct the institution of the proceedings.

Further, I think there is no doubt that the prisoner did "institute" these proceedings. Of course he acted on the information of Lekha the informer, but Lekha did not charge any one; whereas the prisoner did, (by signing the charge sheet) and was, in fact, the sole mover in the matter of making the charge against Teluck Singh.

(5.) When a Police Officer's diary is put in as evidence against him, it must be used as a whole. Mere garbled extracts are not admissible.

(6.) The prosecution, when establishing the fact that a Police Officer acted, knowing there to be no just grounds for proceeding, is bound to call all those on whose statements such officer said he acted. General analysis of the evidence in the case and exposure of misdirection in the charge.

The important and difficult questions in this appeal are those as to evidence and misdirection. The Judge's charge to the jury is of extraordinary length, and discusses many questions with which the jury had nothing to do, and which it ought to have been the object of the Judge to keep from them as far as it was possible. The first part of the charge argues and disposes of certain legal objections which had been raised by the prisoner's Counsel.

With these objections the jury had nothing whatever to do. All that the Judge had a right to do, was simply to state how the law stood, and to "sum up the evidence on both sides."

That portion of the Judge's charge which extends from the beginning down to the words "Having disposed of these points of law, I have now to take the case on its merits," ought never to have been put to the jury as part of the summing up; and were there no other fault to be found with the Judge's charge, I should say (considering the nature of the discussion and of the Judge's remarks in the course of it) that this would amount to a substantial misdirection, vitiating the trial. There is much in this part of the charge which is greatly calculated to prejudice the jury unfavorably against the prisoner, as the Judge should not have put any portion of it before a jury, I think this amounts to a substantial misdirection. It is all important that Judges in charging juries should avoid all extraneous and unnecessary discussion and argument, and should confine themselves, as directed by Section 379, Code of Criminal Procedure, to a mere summing up of the evidence on both sides, showing how the law applies to it. Discussion and argument, however careful and learned, as to what the law is, invariably tend to confuse and mislead a jury. And, considering that, in the present case, a period of three days was allowed to elapse between the close of the prisoner's defence and the Judge's summing up, (the Judge having adjourned the Court from Saturday till the following Wednesday in order to prepare his summing up) it was all the more necessary that the evidence on both sides should be carefully sifted and put distinctly before the jury. As to the charge, so far as it deals with the case on its merits, I think there has also been a misdirection, and that there was *no* evidence to support a conviction on either the second or third count; for, as the prisoner has been found not guilty on the first counts, I shall look at the case exclusively with reference to the second and third counts. I think there is much that is both correct and acute in many of the remarks made by the Judge in his summing up. But the misdirection is general, and pervades the whole charge, resulting from a total misconception or losing sight on the part of the Judge of what had or had not to be proved, and of what was or was not proved.

The case for the prosecution is shortly this One Lekha Dosad, a dacoit and prisoner, having been convicted and sentenced (by the Bhagulpore Court) to a long period of inprisonment, made certain confessions, the result of which was that he received a conditional pardon, and was made over to the Detective Police as an approver. The prisoner was an Assistant or Inspector of the Detective Police, of which Mr. Reily is the head. Mr. Reily, having himself had interviews with Lekha Dosad at Patna, returned to Calcutta, leaving the prisoner at Patna for the express purpose of prosecuting inquires based on the information given by Lekha Dosad. The prisoner then, on information given him, as he says, by Lekha, searched the house of one Teluck Singh, where certain thalees were found, which Lekha Singh said had been taken from one Tokhun Roy, who had been robbed by him and other dacoits some time previously.

Tokhun Roy was produced from his house in Zillah Sarun, and identifide

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the thalees; he stated that when robbed he was on his way to his house in Sarun from Midnapore, and that he had got the thalees at Midnapore, where they had been delivered to him by the Police as part of the property of his deceased son Roshun, who had himself been a Constable.

The prisoner reported these facts to his superior officer Mr. Reily, who was in Calcutta, and asked that the necessary witnesses should be sent for from Midnapore to identify the thalees. Mr. Reily said that it would save expense if the thalees were sent down to him in Calcutta, where he would find out whether the Midnapore people really could identify them or not. This was in the end of March or beginning of April. About the 1st June, Mr. Reily returned the thalees to the prisoner, sending up certain witnesses from Midnapore, and directing the prisoner to proceed at once against Teluck Singh. He did so, and the case, in the opnion of the Magistrate, broke down, and Teluck Singh was discharged. The search of Teluck Singh's house was made by the prisoner on the 16th March. On that day the prisoner reported to the Magistrate that he had arrested Teluck Singh on another charge (one of murder); and he also stated in his report that he had searched his house, and found certain stolen property, but he did not give the details of the stolen property said to be found. Teluck Singh was charged before the Magistrate of Patna with being concerned in the murder of one Heeramun; but he was discharged by the Magistrate on the 4th of April.

As he was leaving Court, Teluck was stopped by the order of the prisoner, and was made to give bail to appear when required to answer any charge that might be made against him for being in possession of stolen property, (that is to say, in connection with the thalees.)

Mr. Worsly, the Magistrate, who had just discharged Teluck, saw him stopped by the prisoner's orders, and enquired into the reason, when the prisoner explained what he was doing. At that time, *i. e.*, the beginning of April, certain other persons (Imrit and Dharee) had been charged before the Magistrate of Sarun with committing the robbery on Tokhun Roy, in the course of which the thalees found in Teluck Singh's house were said to have been carried off. On the 8th of April, the prisoner, in writing to the Magistrate of Sarun, mentioned that he had a charge of receiving against Teluck Singh, and that he would send him for trial as soon as he had sufficient evidence. The prisoners, Imrit and Dharee, were discharged at Chupra on the 1st June. On the 2nd June, the Midnapore witnesses arrived with the thalees, and Mr. Reily's direction to proceed. Whereupon on the 3rd, Teluck was arrested, and on the 4th a charge was made against him in Court by the prisoner, but in the Court of the Magistrate of Patna, and not in the Court of the Magistrate of Sarun. The prisoner's diary contains an entry of Teluck Singh's arrest on the 4th of June, but contains no notice of what occurred as to his giving bail on 4th April.

These are the general facts which the prosecution proposed to prove. I shall now enquire what was the evidence put before the Court in support of the second count.

What had to be proved was that the prisoner, (A) with intent to cause injury to Teluck Singh, (B) instituted, or caused to be instituted, a criminal proceeding against Teluck Singh, (C) knowing that there was no just or lawful ground for such proceeding.

The last of these three points—the guilty knowledge—is the most difficult to prove, but that it should be proved substantially by the prosecution is absolutely essential. The prisoner being put on his trial for a criminal offence, it is for the prosecution to make out a distinct case against him, not for the prisoner, in the first instance, to justify himself, and show that he had just and lawful grounds. What has the Crown proved, looking at the evidence for the prosecution, apart from that for the defence? The Judge, although he told the jury that the guilty knowledge must be proved, practically himself wholly lost sight of the question; he never seems to have stopped for a moment to enquire what the case made by the prosecution against the prisoner really

amounted to, much less did he attempt to show the jury what it was. The case for the Crown, as laid before the Court, in truth, proved nothing whatever as to the prisoner's knowledge or otherwise that there were no just or lawful grounds for the proceedings; and had the trial been properly conducted, the Judge on the close of the case for the Crown would have directed the jury that there was no evidence to support a conviction, and that they must return their verdict of not guilty, without calling upon the prisoner to enter upon his defence.

The witnesses for the Crown are Mr. Worsly, Mr. Reily, Issuree Pershad, Teluck Singh, and Enayet Hossein, of whom I may almost say that no one knows anything that is material against the prisoner. Then the prosecution put in a mass of papers consisting chiefly of the records in various cases, more or less connected with Teluck Singh or the gang of dacoits to which Lekha belonged. These records, although I find them lying before me as part of the exhibits filed in the present case, are said by the Sessions Judge not to have been admitted, except so far as they go to prove certain matters only. But they should not have been admitted as they have been. They were either admissible or inadmissible. If they were not admissible, they should have been excluded altogether. The Judge says of the record in the case against Teluck Singh for receiving (Section 412) that it was "read" "excluding judgment and depositions admitted, so far as proof of the acts and proceedings of the Court are concerned, and depositions admitted of witnesses now examined in this Court." What is supposed to be the meaning of "reading" and admitting after this fashion, I do not understand. The acts and proceedings of the Courts which it was necessary to prove, should have been proved in the regular manner, that is to say, such particular documents as were necessary to that end, and as were admissible, should have been put in. The depositions of witnesses examined in the other cases, who were also examined in this case, are not evidence, except when, at the trial, in this case, the witness was expressly examined as to his former deposition, and it was put in to contradict him.

And here I may remark (although the observations would perhaps come in more regularly in dealing with the third count) on the exclusion, by the Judge, of certain extracts from the prisoner's diary, which were tendered with a view of explaining certain other extracts which were admitted as evidence against him. It is quite true that, by Section 154 of the Criminal Procedure Code, a Police officer's "diary shall not be evidence of the facts stated therein, except against the Police officer who made it." But the present was not a case in which it was wished to use the diary against any third person. Certain portions of the diary were put in as evidence against the prisoner, and he had a perfect right to place before the jury any other portions which explained those which were admitted. The diary, as a whole, (so far as it bore on the matters at issue) ought to have gone to the jury, or it ought not to have been placed before them at all. The whole diary might properly be used against the prisoner, but not mere extracts or garbled portions of it.

The prosecution has been conducted in a very extraordinary way altogether. Lekha, the person on whose information the prisoner is alleged to have acted, and on whose information indeed it was known that the prisoner said he acted, was not called by the prosecution. Nor was Tokhun Roy, nor were the Midnapore witnesses. No body, in fact, who could have shown really what the prisoner's grounds or supposed grounds for proceeding were.

Such a mode of conducting a prosecution is most improper. It was the distinct duty of the Crown, in common ordinary fairness to the prisoner, to have put into the witness box every one of the persons on whose testimony the prisoner avowedly relied in sending up the case. What these persons said before Mr. Worsly when the charges against Teluck Singh, under Section 412, came on to be heard, in no degree shows that the prisoner had not just and lawful grounds for sending the case up. The question is not to whom the thalees in truth belonged, or what the witnesses said before Mr. Worsly; the question is, what the witnesses had previously said to the prisoner, and what he, at the

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time he instituted the proceedings, had reason to believe they knew, and could prove. It may very well be (and indeed probably is the case, whether he was acting *bonâ fide* or *malâ fide*) that no one was more surprized than the prisoner himself when his witnesses declined before Mr. Worsly to speak positively to the thalees. It seems to me that, if the prisoner had been acting *malâ fide*, he would have been more certain of his instruments, and would not have gone into Court with witnesses who were to break down at the very threshold. As it is, the prosecution left the case without a scrap of what is even supposed to be direct evidence as to the prisoner's grounds, except so far as the grounds may be gathered from the prisoner's written defence before the Magistate. From Lekha Dosad's general confession in February, 1867, (Exhibit 12, admitted by the prisoner's Counsel) and from Mr. Worsly's evidence (if indeed it can be construed against the prisoner) it appears that Lekha Dosad, in the prisoner's presence, told him (Mr. Worsly) that he had told the prisoner that he had given thalees of this kind (*i. e.*, I presume thalees like the ones produced in Court) to Teluck Singh. The real case for the prosecution is rested not on any direct evidence, but on a number of facts which are relied on as suspicious, but not one of which, in itself, is less consistent with the prisoner's innocence than with his guilt.

It is said that the prisoner, before arresting Teluck Singh on the charge of receiving stolen goods, charged him with the murder of one Heeramun upon the same evidence upon which he had previously been charged (not by the prisoner however) unsuccessfully with concealing the body of Heeramun. But the charge of murder was not made on exactly the same evidence as that on which the charge of concealing the body rested, and the offence charged was substantially different. I do not see what connection the charge for murder has with the subsequent charge for receiving. When Teluck Singh was sent up on the charge of murder, the prisoner mentioned, in the chalan which accompanied him to the Magistrate, that stolen property had been found in his house; so that the suggestion that the charge of receiving was got up when the charge of murder failed falls to the ground.

Then it is said that Lekha in his general confession(of February, 1867,) did not say anything about Teluck Singh having received the stolen property. This may be so, and is matter of comment when the value of Lekha's evidence comes to be inquired into. It is, however, but slight evidence at best that his subsequent statement was untrue, and would in no degree have justified the prisoner in not acting on the subsequent statement if he believed it on the whole to be true. The silence of the confession of February is no evidence that the prisoner knew he had no just or lawful ground for instituting the proceeding; it was no possible reason why the prisoner should necessarily have doubted the truth of Lekha's subsequent statements. But whereas the prisoner held Teluck Singh to bail on April 4th, he did not enter the fact of his arrest in his diary until June 4th. This may or may not be an irregularity. But what evidence is it one way or other as to whether prisoner on the 4th of April, or 4th of June, or on both these dates, believed that the man had received stolen property, or that he, the prisoner, possessed evidence to prove it? It is not even as if there had been any concealment in what was done by the prisoner on the 4th of April, what he did was done under the eyes of the Magistrate, who asked what he was doing; and on being told, made no objections to it whatever. Furthermore, in the letter of the 8th of April, he announced to the Magistrate of Sarun that he had held Teluck Singh to bail, and would send him up when the necessary evidence arrived. Again, whereas the principals, Imrit and Dharee, were charged before the Magistrate of Chupra as principals in the robbery in which the thalees (which Teluck was charged with receiving) were stolen, the charge against Teluck was not made before the same Magistrate; and this fact is relied upon as showing bad faith. I think it is no evidence of anything of the sort. It may possibly be evidence of a desire to have the matter brought before another Magistrate; but when a person has a right to select one or other of two Courts, his selecting the one in preference to the other is no evidence of *malâ fides*. Moreover, in the present

instance, there were various very good reasons (one of them given by Teluck Singh himself) why the case should be instituted at Patna, and not at Sarun. I may add that I doubt much whether, by reason of the letter of the 8th April, it cannot be correctly said that the proceedings were on that day instituted at Sarun.

That the prisoner should not have brought to the notice of Mr. Worsly that the principals, Imrit and Dharee, had just been acquitted at Chupra, was no doubt wrong. The prisoner may perhaps have been unduly anxious to secure a commitment. But this is no evidence that he knew he had not just or lawful grounds for instituting the proceedings. So as to the defects in the reports made by the prisoner to Mr. Reily, I must add that I do not concur with the Judge in the opinion that they materially affected the sanction given by Mr. Reily to instituting the proceedings, except, possibly, so far as regards any question as to instituting the same in Patna, rather than instituting them in Sarun.

Irregularities and an undue zeal on the part of a Police Officer are highly blameworthy. But it by no means follows, and cannot legitimately be inferred, that he has no just grounds for proceeding, merely because he is guilty of irregularities, or displays undue zeal.

It is argued that, from all the various suspicious facts to which I have referred, the jury might properly be directed that they were at liberty to infer the guilty knowledge required to justify a conviction under Section 211. I think they could not properly be so directed, because, as I have already said, there is not any one of these facts that is not as consistent with the prisoner's innocence as with his guilt, and because, under such circumstances, innocence must be presumed.

I think, moreover, that, even supposing there were some evidence which might be left to the jury on this count, the summing up of the Judge was defective and wrong; in that it did not point out to the jury the extraordinary weakness of the case as presented to them by the prosecution, the fact of its being based solely on a series of suspicions, and the fact that so many of the witnesses who ought to have been called were not called. If there was any case at all for the jury (which, as I have already said, I think there was not) that case was not fairly presented to them without their attention being most particularly called to these points.

In the third count the prisoner is charged, for that he

(A.)—As a public servant charged with the preparation of a document,

(B.)—Framed that document in a manner which he knew to be incorrect,

(C.)—Intending thereby to cause, or knowing it to be likely that he might thereby cause, injury to Teluck Singh.

I shall take it for granted that the prisoner ought to have reported his arrest of Teluck Singh on the 4th of April to the Magistrate, that he did not so report it, and that he was wrong in entering the arrest of Teluck Singh as an arrest of the 4th of June, instead of the 4th of April. Whether he knew he was doing wrong, is a more difficult question. The prisoner says he did not know he was doing anything wrong, and that he did not look upon the taking bail on the 4th of April as an arrest. Has the Crown proved substantially that he had a guilty knowledge? The Sessions Judge says every man must be presumed to know the law. So he must in a certain sense. But it does not follow that a criminal intent or knowledge is necessarily to be imputed to every man who acts contrary to the provisons of the law. It appears to me that the natural, if not necessary, inference to draw from the prisoner's conduct is, that he did not know that there was anything wrong in his omission; for, on the 8th of April, (only four days after the arrest and holding to bail of the 4th of April) he wrote to the Magistrate of Sarun that he had Teluck Singh on bail, and was only waiting for certain witnesses to send the man up before the Court. This fact, coupled with what occurred in Mr. Worsly's Court on the arrest of Teluck Singh on the 4th of April, seems to show conclusively that the prisoner, in making no entry on the 4th of April, did not know he was doing

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wrong, and did not intend to injure Teluck Singh, or know that he was likely to injure him.

The whole matter was done most openly. As we have seen, he on the 8th wrote of it to the Sarun Magistrate, and on the 4th he, at the moment of the arrest, explained his reason for making it to Mr. Worsly. Mr. Worsly says:—"I asked why he had arrested him. He replied that there was a case or cases against him for the possession of stolen property." Mr. Worsly himself was the very Magistrate before whom the prisoner brought on his case upon the 4th of June. What possible injury did ensue, or was likely to have ensued, to Teluck Singh from the report not having been made on the 4th of April? None whatever upon the evidence. And as the not making the report is not, *per se*, an offence, not unless the guilty intent or knowledge is established, there is no evidence upon which the verdict of the jury upon the third count can be supported. The jury ought to have been directed that the evidence would not support a conviction on the third count. They were not so directed, and, in my opinion, the verdict ought to be set aside, and a verdict of not guilty ought to be entered on that, as also on the second count.

I form this opinion without looking at the evidence for the defence; but it is right to add that the evidence for the defence satisfies me that, whatever may be the irregularities of which the prisoner was guilty, he had ample grounds for instituting the proceedings against Teluck Singh, and leaving it to the Magistrate to dispose of the charge upon such evidence as was available.

The sentence passed upon the prisoner must be set aside, and he must instantly be released. The fine imposed, if it has been paid, must be refunded to him.

Seton-Karr, J.—I hold with my brother Macpherson that there has been a general misdirection in this important case, and that the prisoner has been illegally convicted; and I concur generally in the remarks which he has made on the trial of Nobokishto Ghose.

There was an attempt made before us by Mr. Reed, who ably defended the prisoner, both at the Sessions and in Appeal, to make out that the prisoner should not have been put on his trial at all, and that he was simply carrying out the orders of his superior officer, and, as such, that he was not criminally responsible. Now, I can conceive many cases in which such a plea might be successfully urged in bar of an action; and indeed if every subordinate Police Officer who charged, or assisted to charge, a house-holder with the receipt of stolen property, was liable to be put on his trial, because the identification of the property by the party robbed was not credited, it is easy to see that the operations of the Police, whether of the Regular or the Detective Force, would very soon come to a complete stand-still. But in this case, as my brother Macpherson observes, the prisoner, and not the approver, Lekha, did institute the proceeding; and it was not therefore illegal or wrong to look on him as responsible, and to put him on his trial. I hold, too, that there was no illegality in the division of the charge under Section 211 into two parts. A man may be said to institute an offence punishable with transportation, and also to institute, or cause to be instituted, a criminal proceeding with intent to injure. The intent of the law, however, and the whole gist of the offence, lies in this, that it must be clearly and satisfactorily shown that the person making the charge knew that there was no just or lawful "ground for such proceedings or charge," and the Judge's charge is marked by a want of attention to this most essential and necessary ingredient in the conviction.

My own reasons for releasing the prisoner may be thus stated *seriatim*. The facts have been so clearly given by my brother Macpherson, that I need not recapitulate them.

First.—It was irregular for the Judge to discuss in his charge to the jury the various points of law, some of them minute and difficult, which were raised by the prisoner's Counsel; and this introduction into the charge of matters foreign to it was only calculated to puzzle and mislead the jury.

Second.—The Judge nowhere puts before the jury any clear statement of the

main facts which it was for the prosecution to prove, and which were essential to a conviction. He does certainly refer to portions of the evidence, but he nowhere states the case lucidly and properly to the jury. He does not constantly keep before them what had to be proved, what might be taken to be proved beyond question, and what inferences of guilt or innocence they might or might not draw from the facts, if they credited the evidence; in fact, he does not insist on the guilty knowledge, that is, on the knowledge, that there was no cause for instituting the charge at all. Again, when the Judge told the jury that the principal thing to be considered in such a case was whether, "in fact, the acts said to have been committed by the accused were actually committed, and whether they were committed injuriously without warrant of law," he misapprehended the real point of the case, and quite misdirected the jury. Warrant of law, it is obvious, there was for the arrest of Teluck. What, as I have already observed, was essential to the conviction of Nobokisto, was that it should be shown that he was well aware that he was bringing a false and malicious accusation.

Third.—The greater part of the Judge's remarks on the evidence as to the indentification and recognition of the thalees, out of which the prosecution arose, seem to me to be entirely out of place. They might have been very pertinent on the trial of a receiver, at which the Judge was charging a jury on the identification of certain articles of property claimed by a prosecutor on the one hand, and by the thief or receiver on the other. In this trial they were mainly irrelevant; and it is impossible to gather from them from what facts *mala fides* was to be imputed to the prisoner, and how it could be said, from anything which any witness discloses, that the prisoner was perfectly well aware that there were absolutely no grounds, whatever, for his instituting the prosecution against Teluck. But this knowledge, to be proved directly, or to be legitimately inferred from circumstances, was all important to conviction; and unless the prisoner was shown to have conspired with Tokhun Roy, or to have known that the thalees, which originally came from Midnapore, never belonged to Tokhun at all, it is not easy to see how guilty knowledge was to be inferred.

Fourth.—Records of other cases, in which the prisoner was not concerned, have been improperly admitted, and this admission told unfairly against the prisoner.

Fifth.—On the last charge, that of "framing an incorrect document with intent to injure," there is an utter failure on the part of the Judge to show in what way the omission of the date of April, and the simple insertion of the date of arrest as two months later, or in June, was calculated to injure Teluck. The Judge tells the jury that they are to consider whether the omission was likely to injure the accused, or whether he was likely to be worse for the concealment; but how, or in what way, Teluck was to be injured, the Judge does not state. It is quite clear, on the other hand, that the Magistrate was well aware of what had taken place in April; that there had been no real concealment of any material transactions; that the institution of the other case in Chuprah was made known as the enquiry proceeded; and that, on this point, the evidence was a failure. The Judge should have so directed the jury in clear terms.

Sixth.—The prisoner was prejudiced, and could not but have been prejudiced, in the eyes of a Native jury by the remarks of the Judge scattered through his charge.

The trial, it is obvious from the record, was one in which local feeling and local jealousy were much excited. Rivalry or jealousy between the Regular and the Detective Police is admitted to exist; and though there was nothing illegal in the appearance in Court of the Magistrate, both as prosecutor and witness, yet I cannot regard this part of the trial as one which we can dwell on with any satisfaction.

But whatever may be said in favour of the zeal of any Magistrate anxious to put down false complaints and false arrests, it is certain that as there was this local excitement on the trial, the Judge ought to have risen superior

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to any such feelings; he should have placed before the jury a clear and dispassionate statement of the facts, and then have pointed out to them the inferences which the facts might warrant them in drawing; he should have particularly warned them against being led away by jealousy or pique; and he should have carefully abstained from any remarks in the least calculated to mislead, inflame, or prejudice.

I regret to say that the reverse of this has been the case. No one can read the Judge's charge without feeling that there are passages in which the language is neither grave nor temperate, and which, as those who know Natives must admit, could only have the effect of inducing the jury to think that a conviction would be a safe termination to the trial. The prisoner, too, was a native of Bengal, tried in a strange Province. I allude particularly to such a passage as the following, which ought not to have been uttered. "It is very material that the Detective Police Department, the head of which Mr. Reily, had, in open Court, professed utter ignorance of their duties and powers, should know that they cannot shelter themselves behind a wretched convict, a dacoit and prisoner, a man liable at any moment to be relegated to prison for the crimes of which he stands convicted, and to be convicted of other crimes, for which he has not yet been prosecuted; *a pretty shield truly for the officers of the department charged with the most delicate and most responsible branch of the duties of the Police of Bengal.*" As the Judge took three days to consider his charge, and as the prisoner was defended by Counsel, who put before the Court every point that could be favourable to the interests of his client, it is much to be regretted that such remarks should have been made. That the Judge took very great pains with the case, I am most ready to admit; but there was therefore the greater reason that the long labor so spent should have terminated in that acquittal, at which, after a very full and patient hearing, we have both unanimously arrived, and which it now becomes our duty to pronounce.

PART IV.

HIGH COURT CIRCULARS AND LETTERS.

CIRCULAR ORDER No. 29.

To

ALL CIVIL JUDGES.

Dated Calcutta, the 13th September, 1867.

HIGH COURT, &c., CIVIL SIDE.

Before *Loch*, J.

Requests strict compliance with provisions of Civil Circular No. 28 of 1864.

Several recent instances having occurred of the neglect of the provisions of Civil Circular No 28, dated 20th September, 1864, the Court again call attention to the subject. A *copy* of the judgment in the language in which it was delivered is required, and not a translation of that judgment. The Judges are requested to draw the particular attention of the subordinate Judges to the subject.

CIRCULAR No. 31.

To

ALL CIVIL JUDGES, LOWER PROVINCES.

Dated Calcutta, 25th September, 1867.

HIGH COURT, CIVIL SIDE

Before *Loch, Bayley, L S Jackson*, and *Macpherson*, J. J.

Instructions as to the mode of levying *tullubana* for the service and execution of Civil process by peons appointed under Act V (B C.) of 1863.

Vide Government letter No. 4767T, dated 21st August, 1867.

In modification of paragraph 3, of Circular Order No. 10A., dated the 26th April, 1864, the Court are pleased, with the sanction of the Lieutenant-Governor of Bengal,* to issue the following instructions, adopted with slight modification from the Rules issued by the Board of Revenue, as to the mode of levying *Tullubana* for the service and execution of Civil process by peons appointed under Act V (B. C.) of 1863.

The following fees are to be levied for the service of each process, besides charges for boat-hire, ferries, postage, &c., which are to be paid separately as provided in Section 4 below:

Levy of fees.

1. If the distance of the place of service or execution from the Court whence the process is issued, calculated, not as the crow flies, but by the road the peon must travel, does not exceed twelve miles, eight annas. If the said distance exceeds twelve miles, one rupee.

2. As many processes as possible are to be entrusted to one peon. For every additional process after the first *issued at the instance of the same party and in the same case, and carried by* ONE *peon over* ONE *road*, the fee is to be one-fourth of the rates above specified In such cases the whole fees levied for all the processes so carried for one party are to be charged for the purpose of fixing costs in equal shares upon all the processes so carried.

3. If a peon is detained at the place of service for more than one day, at the request of the person at whose instance the process was issued, or of his agent, such person or agent must pay then and there demurrage at the rate of five annas a day. Unless this demurrage be paid, the peon must not wait.

Additional charges.

4. All sums, except those referred to in Circular Order of 11th May, 1866, No. 18, levied under the preceding Rules, are to be credited to the Government to form the fund prescribed in Section 9 of the Act.

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5. In addition to these fees, the actual charge which must be incurred, if it is necessary to employ boats or cross ferries, is to be levied from, and paid by, the person at whose instance the process is issued, before issue of the process, to the peon who carries the process.

CIRCULAR No. 32.

HIGH COURT, &c.
CIVIL SIDE.

To

ALL DISTRICT JUDGES.

Dated Calcutta, the 28th September, 1867.

Before Peacock, C. J., and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J J

Form for quarterly return of grant of probate and letters of administration made under Act X of 1865.

The Court direct that a Quarterly Return in the annexed form (contemporaneous with the Quarterly Civil Returns) be made by all District Judges to the High Court of all grants of probate and letters of administration made in accordance with the provisions of Part XXXI, Act X, of 1865. The Return should contain the name and description of the deceased person, and of the persons who have been granted letters of administration, and, in probate cases, of all the executors named in the Will.

Return of grants of Probate and Letters of Administration made by the District Judge of , under the provisions of Part XXXI, Act X of 1865, *for the Quarter ending* 186 .

Name and profession of deceased person.	Name and profession of persons to whom probate or letters of administration were granted.	Names of all the executors in the will in probate cases.	Date of grant.

CIRCULAR No. 34.

Circulated for the information and guidance of the Civil Authorities in the Lower Provinces.

HIGH COURT, &c.,
3rd December, 1867.

RULES

Relating to the Custody and Preservation of Wills.

Rules relating to the custody and preservation of wills.

1. All original Wills, presented to a District Judge, in accordance with the provisions of Sections 244, and probate or letters of administration of which have been granted under Sections 254 and 255, Act X of 1865, shall be committed to the care of the Head Clerk or Chief Ministerial Officer of the Judge's Court, who shall be responsible for their safe custody.

2. The said Officer shall, on the receipt of each original Will, cause a copy of the same to be carefully entered in a Register to be kept for that purpose, and shall also cause to be prepared an alphabetical index, in which the name of the Testator, &c., and the number and page of the Register in which a copy of the Will is entered, shall be recorded in the annexed form:—

Name of Testator.	Residence, &c.	No. and year of Register.	Page.

3. The original Wills shall be deposited in a fire-proof safe, which shall be kept in the Office room of the Head Clerk, or other Officer aforesaid, to

whom the safe custody of the Wills may have been entrusted, or in some other safe place in which the records of the Judge's Court are ordinarily kept.

Relating to the Inspection of Wills.

4. Every inspection of original Wills or the Registers thereof, as well as applications for copies of Wills, shall be made within the hours fixed by the Judge, and published by a Notification posted in a conspicuous place in the Court, and shall be subject to the following conditions:

5. The inspection of an original Will shall be allowed only on the written order of the Judge previously obtained, and shall take place in the presence of the Head Clerk, or other Officer who may have charge of the same, and that Officer shall be responsible for the Will not being taken out of his sight during such inspection, and also that no erasures or alterations are made in it.

6. Application for a copy of an original Will shall be submitted to the Judge, and such copy shall only be granted, subject to the conditions which attach to the inspection of original Wills.

7. The following fees shall be charged for the inspection of wills, &c.:—

First.—For the inspection of an original Will,—1 Rupee.

Second.—For the inspection of a copy of a Will in the Register,—8 annas.

Third.—For copies, the same fee as for inspection, in addition to the copying charges, which shall be at the usual rate obtaining in the Civil Courts.

8. A separate Register shall be kept for the entry of all applications for copies or inspection of Wills and Registers, in which shall be recorded the names of the applicants and the amount of fees paid by them in each case.

9. The fees shall be at the disposal of Government, who shall assign such remuneration as it shall think proper in each case to the Officer entrusted with the custody of the Wills.

CIRCULAR ORDER No. 35.

To

JUDGES OF COURTS OF SMALL CAUSES.

Dated Calcutta, the 14th December, 1867.

HIGH COURT, &c.
CIVIL SIDE
Before *Loch, Bayley,* and *L. S. Jackson*, J.J.
Application for a new trial under Section 21, Act XI of 1865, to bear a stamp of one anna where the value of the subject-matter is less than 50 Rupees.

The following rule is to be substituted for that prescribed by Circular Order No. 32, dated 19th December, 1865:—

"An application for a new trial under Section 21, Act XI of 1865, in any case in which the amount or value of the subject-matter is less than fifty rupees, shall bear a stamp of *one anna*. In other cases it shall bear a stamp of eight annas." (*See* Clause 10, Schedule B, Act XXVI of 1867.)

No. 1430.

To

THE SESSIONS JUDGE OF

Dated the 14th December, 1867.

HIGH COURT, &c.
Before *L. S. Jackson* and *Macpherson*, J. J.
No provision of the Criminal Procedure Code which authorizes a Court of Session to remand to a Magistrate for re-investigation cases of accused persons who have been committed for trial.

Sir,—With advertence to your letter, No. 276, dated the 29th ultimo, forwarding the Officiating Sessions Judge's Memorandum, remanding the case of Seetadhur Opadhea and others to the Magistrate, I am directed to state that the Court consider the order of the Judge to have been made irregularly without authority. Sections 361 and 377 of the Code of Criminal Procedure empowers a Court of Sessions to postpone or to adjourn a trial when it may be necessary; and by Section 367, the Court is empowered to summon and examine witnesses. But there is no provision of the Code which authorises the Court of Sessions to remand to a Magistrate for re-investigation the cases of accused persons who have been committed for trial.

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HIGH COURT CIRCULARS AND LETTERS.

The Officiating Sessions Judge declares "the trial is postponed for next Sessions in November, when it will be re-tried" The meaning of this is not very clear; but, if on the retrial or postponed trial, any accused person should be convicted, and an appeal or revision should follow, it will be for the High Court to determine whether any failure of justice has been occasioned by the irregularity above noticed.

PART VII.

REVENUE CIRCULARS.

JANUARY, 1868.

A. GROTE AND E. T. TREVOR, ESQRS.

Errata.

The number of Pages in the Revenue Circulars for December 1867, *published 3rd January, to be altered from* 1 *and* 2 *to* 45 *and* 46.

No. 1.

Circular Order No 6 for August, 1867, is cancelled, and the following are to be substituted for the present headings of Statement 20C., Analysis of Revenue assessed, at page 302 of the Board's Rules:—

1—Assets assumed as basis of settlement. 2—Deduct, (*a*) Expenses of collection at per cent, (*b*) Other expenses, if any, Total. 3—Remainder. 4—Deduct proprietary allowance at per cent. 5—Remainder, or net revenue of Government.

At page 284 add, at the end of Rule 10, (Appendix Form 20C.),

When there may be any resumed dependent tenures in an estate under settlement, they should be reported in the form given in Rule 4, page 281.

No. 2.

From the revised Returns submitted with reference to Circular Order No. 3 of November 1867, it appears that, in some instances, the requirements of Table II, in Return No. VIA, appertaining to Chief Towns, &c., have been misunderstood.

2. District Officers are therefore reminded that they are carefully to use their discretion in filling up the Table referred to, in which it is not intended that places, other than those of *real importance*, in each District, should be entered.

3. It is further to be noted that Table II and columns 9 to 12 in Table I of Return No. VIA (2nd edition) should exhibit the operations only of the month for which the Return is submitted, and not of any anterior period.

4. The corrections which may be necessary with adverence to these instructions, in Returns already submitted, should be reported without delay.

No. 3.

In Return No VIB. (Government Decrees recovered) add a column before present column 6, to be headed "5½. Amount collected in previous months"

No. 4

With reference to Circular Order No. 10 of July last, the following is to be substituted for Boards's Rule 23, page 201:—

23. A Table in the following form, signed by the presiding Officer, showing the fees leviable for the service or execution of a single process, at places in its jurisdiction, is to be suspended in each Court. The names only of those places for service of a process, at which one of the two rates

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January
REVENUE CIRCULARS.

extant is leviable, should be given, with a remark that, for service of a process at any other place in the sub-division the other rate is leviable. The names given should be of the fewer places to which one rate is applicable, and in alphabetical order. A further note is to be added shewing the places at which a charge for ferries and boat-hire must be paid: the charge, it is believed, is usually uniform for a very large number of the places affected:—

Authorized charges for the service or execution of the Processes of this Court.

Name of Place.	Fee chargeable for the service of single Process	Remarks.
1	2	3

NOTE.

2. Also, insert as a new Rule:—

23A. The Table is to be approved by the Commissioner of the Division, and is not to be altered without his sanction. Copies of the Table are to be printed at the expense of the Process Fund, and held available for sale at a small price to the Revenue Agents, and others interested; as also for distribution to the neighbouring District and Sub-divisional Courts, wherever the issue of any process may be necessary.

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	
Wednesday ...	Ditto ...	Motions, and afterwards Special Appeals ... ... Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given and a list made out ...	Miscellaneous Appeals.	If at the rising of a Division Bench on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	
Friday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter ... Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. } Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

NOTE.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand: and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota-Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
Bograh	Noakhally	Purneah	Rajshahye
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Tirhoot		West Burdwan	24-Pergunnahs.

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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

VOLUME V.

No. 3.—February 3.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month.)

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Regular Appeal from Bhaugulpore.

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2nd December.
CIVIL JURISDICTION.

CASE 183 OF 1867.

Hukeem Bebee, (Plaintiff) *Appellant, versus* Khajah Gowhur Ali and others, (Defendants) *Respondents.*

Before *Kemp* and *Glover*, J J

Mr. C. Gregory for Appellant.
Mr. R. T. Allan and *Baboo Debender Narain Bose* for Respondents.

A died, leaving heirs B and C B was at first pronounced illegitimate, but ultimately got a decree recognizing his status. Meantime the heirs of A's widow sued for her dower, and got a decree first as against the estate of A, but afterwards on appeal, as against C, believed then to be the heir of A, to the extent of the assets of A's estate which might have come into his hands. *Held*, that the heirs of the widow could not execute their decree against A's estate, now in the hands of B, inasmuch as he was no party to the original suit for dower

The plaintiff appeals. Her suit proceeded on the allegation that her vendor, who was the heir of one Khoodija Begum, sued the recognised heirs of the husband of the said lady for the sum of Rupees 53,333-5-4 due to her as the deferred portion of her dower, the exigible portion having been recovered during the lifetime of the husband. A decree* was originally obtained against the estate of the husband, and the rights of the decree-holder under that decree amounted, with costs and interest, to Rupees 85,858-11-4. In her attempt to execute her decree, by the sale of certain properties detailed in a schedule appended to the plaint, she was opposed by the defendant No. 1 under Section 246, Act VIII of 1859; and this opposition being successful, she has brought the present suit.

* The decree is dated the 6th July, 1862.

There are two sets of defendants: No. 1, Khajah Gowhur Ali Khan, and No. 2, Khajah Hubeeboollah and others.

No. 1 defended the suit; but it does not appear that the second set of defendants did so.

The Principal Sudder Ameen dismissed the plaintiff's suit. But before mentioning the reasons upon which his decision is grounded, it will be convenient to consider the position of the parties to the suit, as also very briefly the past history of this litigation.

On the death of Khajah Mahomed Ibrahim, the husband of Khoodija Begum, a dispute arose as to who were his legitimate heirs. The defendant No. 1 in this case, Gowhur Ali Khan, was pronounced at first to be illegitimate, but eventually, after considerable litigation, his status as a legitimate heir of Khajah Mahomed Ibrahim has been recognised by this Court in appeal. Against this finding an appeal is now pending before the Privy Council. The estate of Khajah Mahomed Ibrahim is in the present possession of the said Gowhur Ali Khan, defendant No. 1. As before stated, the heir of Khoodija Begum succeeded in obtaining a decree for the amount due on account of her dower against the estate; but this decree was subsequently modified, and a decree was passed against the defendants, set No. 2, to the extent of the assets of the late Khajah Mahomed Ibrahim which may have come into their hands. In short, the former decree, which was an unconditional one, became clogged with certain restrictions. The plaintiff in this suit stands in the shoes of her vendor, the original decree-holder, and clearly she cannot recover more than she would have been entitled to recover.

The Principal Sudder Ameen observes that, as the defendant No. 1, Gowhur Ali Khan, was not a party to the suit in which the said decree was passed, the property in his possession is not liable to sale in satisfaction of that decree.

In appeal it is contended that the Lower Court was wrong in holding that the present plaintiff was not entitled to follow the estate of the late Mahomed Ibrahim into the hands of the defendant No. 1; that in the former suit the defendant No. 1 was not made a party, inasmuch as his rights as heir were then, and are still, disputed, and had been, in the first instance, declared by the Courts of this country to be null, inasmuch as he was illegitimate; that the present suit, which has included him amongst the parties, is in the nature of a supplementary suit to cure any flaw in the former suit owing to defect of parties.

After hearing the arguments of the pleaders on both sides, we are of opinion that the Principal Sudder Ameen has come to a right decision, and that this appeal must be dismissed.

If the original decree which the plaintiff has purchased had remained unamended, she would undoubtedly have been entitled to follow the estate

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which, under that decree, was charged with the payment of the dower of Khoodijah Begum, into whosever hands the estate might be. But this decree was materially modified by this Court in appeal, and we may observe that the record shows that this modification was made at the instance of the appellant before us. Under the modified decree of this Court, certain parties who are named, and amongst whom we do not find the name of the defendant No. 1, Gowhur Ali Khan, were made liable to satisfy the decree to the extent of any assets of the estate of the judgment-debtor, Mahomed Ibrahim, which might be in their hands. The estate of that gentleman was not made unconditionally liable.

In the present suit the vendor of the plaintiff has not been made a party, and the defendant No. 1 was not a party to the dower suit, the finding, therefore, in the later suit, is not binding upon him. Whether, in the event of the Privy Council holding that Gowhur Ali is the legitimate heir of the late Mahomed Ibrahim, the plaintiff's vendor will become entitled to sue him as in posession of the estate of the late Mahomed Ibrahim, is a question which we need not at present consider. The plaintiff, who has only purchased the rights and interests of the decree-holder in the limited decree above alluded to, cannot execute that decree against a person who was not a party to the suit which that decree governs, nor act in any way in contravention of the strict terms of that decree in its amended form.

The decision of the Principal Sudder Ameen is therefore affirmed, and this appeal dismissed with costs and interest payable by the appellant.

CASE 1057 OF 1867.

2nd December.

Special Appeal from Bhaugulpore.

Kullar Singh and others, (Defendants) *Appellants, versus* Modhoo Dyal Singh, (Plaintiff) *Respondent.*

Before *Kemp* and *Glover*, J. J.

Mr. C. Gregory and *Baboos Debendro Narain Bose* and *Hem Chunder Banerjee* for Appellants.

Mr. R. T. Allan for Respondent.

A sale of family property made by a Hindoo father living under Mitakshara law, merely in order to enable him to redeem a mortgage, the term of which was not near expired, was not made under such a pressing legal necessity as would prevent his son from suing to set it aside if made without his (the son's) acquiescence.

Want of acquiescence on the son's part is sufficient to make the sale by the father void in the absence of legal necessity. It is not necessary that the sale by the father should be wasteful; it might even be advantageous.

This was a suit to annul the sale of 40 beegahs of jaghir land made to the defendant by the plaintiff's father, on the ground that there was no legal necessity for the sale, and that the son had never acquiesced in it.

The family is admittedly governed by the Mitakshara law.

The sale took place in 1264, B. S., and the plaintiff's father died two years after, in 1266, B. S. The present suit was brought in 1271, B. S.

The defence was that the sale was made for certain necessary purposes detailed, and that the son was present when the deed of sale was executed, and consented to it.

The Court of first instance took this view of the case, but the Principal Sudder Ameen, on appeal, held that there was neither necessity on the part of the father, nor acquiescence on the part of the son. He therefore annulled the sale; but, considering that the purchase-money had been applied to the benefit of the property, he directed the plaintiff to repay the Rupees 2,900 advanced by the defendant, before being allowed to take possession of the land.

Against this order both parties appeal specially, the plaintiff under No. 1198.

For the defendant, special appellant, the following pleas are urged :—

First.—That the circumstances of the case disclose a sufficient legal necessity for the sale, and that, unless plaintiff proved waste and dissipation on the part of his father, he would not be entitled to set aside the sale.

Second.—That the Principal Sudder Ameen made a mistake of fact in saying that costs were due from Soorja Koonwaree to Sheo Shunkur, the plaintiff's father, the fact being that he was the party liable.

Third.—That the Principal Sudder Ameen was in error in saying that there was no evidence of the payment to Narain Singh.

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Fourth.—That there was also proof of the marriage expenses of the plaintiff's sister having been defrayed from the purchase-money.

Fifth.—That the finding of the Principal Sudder Ameen as to the plaintiff's presence at the time the kobala was executed is not sufficient. He ought to have found whether he acquiesced in the sale, and his presence or absence at the conveyance was not a material point.

With regard to the first objection, the Principal Sudder Ameen found, on the evidence, that there was no legal necessity for selling the land. The reason alleged for the sale is that by it the plaintiff's father was enabled to redeem a mortgage of 300 beegahs of land. But even if we grant, for the sake of argument, that this was an advantageous transaction, it cannot be contended that it was necessary, for the zuripesghee term did not expire for three years, and the money advanced could not have been demanded till that time had expired. There was no claim in this respect on Sreekishen, and no necessity whatever for his parting with his ancestral property.

It has been argued by Mr. Gregory, for the special appellant, that a son cannot annul a sale made by his father unless he proves that the latter has wastefully sold it; and we have been referred to a decision of this Bench in support of the contention.

The case quoted is to be found in Vol. I, Weekly Reporter, 96, Bishambur Naik, plaintiff, appellant, *versus* Sudasheeb Mohapattur and others, defendants, respondents.

We do not see anything in this decision opposed to the view we are now taking. In it we quoted from the Mitakshara* to show that a son had power to interdict sales made wastefully, but not to interfere when the sales were made for pressing necessities, and for the maintenance of the family. It did not follow from this, nor did we mean to lay it down, that the son could only interfere in cases of waste, for the Section of the Mitakshara quoted says distinctly that "the son must acquiesce in the father's disposal even of his own acquired property."

* Chapter I, Section 5, paragraph 10, page 279.

Had the sale of these 40 beegahs been proved to have been made for either of these reasons, we should have held now, as we did then, that such sale could not be void.

So far then as paying off the zuripesghee lease is concerned, we agree with the Principal Sudder Ameen that there existed no necessity whatever for the arrangement.

With regard to the costs said by the Principal Sudder Ameen to have been due from Soorja Koonwaree to Sheo Shunkur, we find, on turning to the record, that the Lower Appellate Court has fallen into error. A suit was brought by Sheo Shunkur against Soorja Koonwaree, and was dismissed with costs; so that it was Sheo Shunkur who was liable, and not Soorja Koonwaree. The amount due, however, was only Rupees 175; and it would be absurd to contend (indeed the special appellant's pleader does not contend) that a sale of the 40 beegahs of jagheer land was necessary to pay off this trifling debt.

Then as to the payment of Rupees 282 to Narain Singh. The Principal Sudder Ameen has found as a fact, not that there was no evidence of the payment, but that there was no proof of it. And this is a finding with which no interference is possible in special appeal.

Neither can we interfere with the Lower Appellate Court's finding on the fourth ground of special appeal. The Principal Sudder Ameen says that he cannot believe the evidence in support of the allegation that a portion of the plaintiff's sister's marriage expenses were paid from the produce of the sale, and he gives us one of his reasons that the entire amount of that sale, *viz.*, Rupees 2,900, had already been disposed of according to the defendant's statement, and that nothing remained to appropriate.

There remains the objection that the special appellant's acquiescence might have been proved in other ways than by his presence at the time the kobala was executed, and that the Principal Sudder Ameen ought to have gone into the point.

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No doubt acquiescence might have been proved in other ways; but it was the special appellant's own case in the Court below that the plaintiff was present when his father sold the land, and personally acquiesced in the alienation.

It was found as a fact on evidence, that the plaintiff was not present at the time in question, and we cannot now at this late stage of the proceedings, allow the special appellant altogether to alter his case, and take up a new standpoint. It was never contended below that the son's acquiescence might be presumed from his long inaction, or proved by direct testimony. The special appellant rested his plea of acquiescence solely on the alleged fact that the son was present at the time of the sale, and agreed to it.

We see therefore no ground of special appeal in this application, which we accordingly dismiss with costs.

CASE 822 OF 1867.

13th December.

Special Appeal from Hooghly.

Kassee Nath Dey, (Defendant) *Appellant, versus* Ram Chunder Mundul, (Plaintiff) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Appellant.
Baboo Unnodapurshad Banerjee for Respondent.

The question being whether the lands in dispute had been dedicated entirely to the service of the family idol, or whether the sevait had been granted some personal interest in them,—*Held*, that as the express wording of the deeds conveyed the lands entirely to the idol's service, the fact that a portion at least of the profits had been regularly devoted to that service was evidence that such entire dedication was intended to be real. The question whether the sevait had violated his trust did not arise.

Phear, J.—In this case it appears that certain land has been attached and sold in execution of a decree which was passed in another suit brought by third parties against so many of the present defendants as are termed the "debtor" defendants, and at the execution sale the remaining defendants became the purchasers. The plaintiffs now sue to have that sale set aside, and the property in question declared to be debuttur land dedicated to their family idol, Dudhee Bamun Thakoor. The evidence which the plaintiffs adduce in support of their claim consists of five kobalas, ranging in date from 1199 to 1208, and purporting, on the whole, to convey the land in suit to Dudhee Bamun Thakoor, Sebait Gournarain, and Radhamohun for a money consideration paid by them. Next a taidad filed in the Collectorate in 1209 by the same, which described the said land as debuttur land dedicated to the said Thakoor, and also evidence to show that the expenses of the Thakoor had been invariably defrayed out of the proceeds of these lands from the date of the kobalas to the time of the execution sale. The plaintiffs also put in evidence to prove that they, together with the debtor defendants, were the co-heirs of the parties mentioned in the kobalas as sebait, and were therefore entitled to hold and manage the property on behalf of the Thakoor. It does not appear that any of this evidence was materially impeached by the defendants, and upon the strength of it both Courts below have given a decree in favor of the plaintiffs.

It is now objected before us, on special appeal, that this evidence is not sufficient in law to lead to the conclusion that the plaintiffs and the debtor defendants had no beneficial interest in the land. It is argued that the words of the kobalas confer express power on the sebait to sell or give away the land which is conveyed to the Thakoor, and do not impose upon him the obligation either to devote the rents and profits of the land, or to exercise the powers of alienation, *solely* for the purposes of the worship; further, that the taidad is not shown to cover the land in question; and, finally, that, even if the expenses of the Seba have been met out of the rents and profits of this land, there is nothing to show that all the rents and profits have been so consumed.

On the other hand, the plaintiffs urge that it is a necessary implication, from the fact of the conveyance being made to the Thakoor, and not to the Sevait himself; that the Sevait was directed to manage and deal with the property solely for the purposes of the Thakoor and its worship.

The sole question which we have to consider on this appeal is whether there is evidence before the Court sufficient in law to support the conclusion that the ancestor of the plaintiffs and the debtor defendants, after having pur

chased, or at the time of purchasing the land in suit *bonâ fide*, devoted it entirely to the service of the family Thakoor. I confess that, during the progress of the case, I have had considerable doubts on this point. On the whole, however, I am now of opinion that there is some evidence both of a nominal dedication of the whole of the land, and also of the *bona fides* of that dedication. I think that the Lower Courts were right in interpreting the kobalas as being intended to express a dedication of the land solely to the service of the Thakoor; and I also think that the persistent application of a portion, at least, of the proceeds of the land to the purposes of the dedication, is some evidence of that dedication having been at the first intended to be real. We are not now concerned with any question as to whether the successive Sebaits have fully discharged their trust or not; nor do I desire to say that the evidence to which I have referred would have satisfied me as to the creation of the trust itself, had I been trying the case on its merits. I confine myself simply to saying that it seems to me there is evidence upon which the Lower Courts might legally come to the conclusion at which they have arrived. The appeal must therefore be dismissed with costs.

Bayley, J.—I think, looking to the correspondence of the taidad and the kobalas, and to the dates of both, and to the fact that all the six kobalas do not contain the power of transfer, on which fact the most stress was laid in special appeal, but that all do stipulate that the service of the Thakoor shall be provided for as the condition on which the enjoyment of the land is to pass, there is evidence that the land is of that debutter class which is not ordinarily alienable. I also would, therefore, dismiss this special appeal with costs.

Relative to Appeal to Her Majesty in Council.

CASE 82 OF 1867.

14th December.

Nowab Shidhee Nazeer Ali Khan, *Appellant* to England, *versus* Rajah Ojoodhyaran Khan, *Respondent* to England.

Before *L. S. Jackson*, J.

Baboo Ashootash Dhur for Appellant.
No one for Respondent.

This rule must be discharged with costs. The provisions of Regulation XVI of 1797, relating to the giving of security before execution of a decree which has been appealed to Her Majesty in Council, refer to cases in which execution would change the possession of the property to which the decree relates. It is not the object of the plaintiff in this case to obtain any change in the possession; but he asks that those provisions of the decree be carried out under which the state of the accounts between the mortgagor and mortgagee is to be ascertained. There is no reason why this enquiry should not proceed and the Judge will be directed to carry on the investigation with the least possible delay. If, on enquiry, it should appear that the mortgagor's debt, principal and interest, has been paid off, and he is entitled to come into possession, (whether any surplus be due or not) it will be time for the plaintiff to apply for possession, and for the Court to make an order in the matter of security, if by that time the Privy Council should not have given its decision on the appeal against what may be looked on as the interlocutory order

No security need be taken from a party to a case appealed to the Privy Council when possession of the property does not pass into his hands.

When the High Court decree has ordered a taking of accounts between the mortgagee in possession and the mortgagor, and an appeal has been made to the Privy Council no security need be taken from the former till it appears that the mortgage debt has been paid off with interest. The taking of accounts may proceed, notwithstanding the appeal to England.

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CASES 37, 51, 158, AND 159 OF 1867.

Regular Appeals from Patna.

Hedayutoonissa Begum and others, (Plaintiffs) *Appellants*, *versus* Shib Doyal Singh and others, (Defendants) *Respondents*.

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. R. E. Twidale, *Moonshee Ameer Ally*, and *Baboo Romanath Bose* for Appellants.

Baboos Unnodapurshad Banerjee, *Sreenath Dass*, *Kishen Succa Mookerjee*, and *Poornochunder Shome* for Respondents.

Where plaintiff has let his lands on lease, he cannot sue *during the currency of the lease* to compel the lessee's under-tenants to pull down houses built by them, where there is no allegation of waste or damage caused thereby.

In these cases three separate sets of plaintiffs sued the same defendants in three separate cases, claiming to compel them to clear certain lands in Mouzah Makra of houses brick built, and built of mud, and tiled, and also to compel them to cut down mangoe, bamboo, and other trees. The suits were also intended to restrain the defendants from building or encroaching for the future.

The plaints were all drawn in the same form, and the representation of each plaintiff was that the village had been given to one Soorjo Singh, first in kutkina, and then in ijara, and that from the year 1269 the real defendants, Shib Doyal and Ram Lall, had gradually outstepped the limits of their homesteads, built houses, laid out gardens, and had usurped much more than they had any right to.

The extent of the plots originally held by the defendants, and the nature of the several encroachments, were all very fully and accurately set forth in the several plaints, with specific boundaries; but it is unnecessary to do more than to advert to this fact.

The defendants pleaded that they had lived on the same lands for several generations; that their ancestral residence stood thereon; that they had only repaired and enlarged the same, as opportunities offered, without any encroachment; and that the plaintiffs had been perfectly well aware of what had been done, and had acquiesced in the same. The defendants also put forth a singular statement, to the effect that in that part of the country residences were exempt from payment of rent.

The Principal Sudder Ameen took up the three cases together, went into the evidence which was mainly, if not entirely, oral, and gave a decree to the plaintiffs in each of the cases for plots numbered 5, 6, and 7, refusing them the first four plots.

The plaintiffs have brought three separate appeals to obtain plots 1 to 4, and the defendants have appealed, in No. 51, against the decree for plots 5 to 7.

We have heard some of the material evidence on both sides, but it is unnecessary for us to give any opinion as to the force and weight thereof.

One thing has been overlooked by the Lower Court, and that is that the three suits are premature. The defendants do not deny the title of the plaintiffs as landlords. The plaintiffs, on the other hand, do not deny the lease to Soorjo Singh, under whom the real defendants, Shib Doyal and Ramdoyal, hold. The extraordinary plea of the defendants, as to exemption of houses from rents, could not be tried in these suits under any circumstances.

What, however, is quite clear is that the plaintiffs have no righ to set aside, as it were, Soorjo Sing, the lessee, and to go in under him and compel his tenants to knock down their houses and cut down their trees. This is not a case of alleged waste or damage.

If the buildings were really in existence when the lease began, as partly seems to be admitted by the plaintiffs, they can have no right now to call on the defendants to remove them. If they were raised, and if the gardens were laid out by encroachment after the lease had commenced, then the time for the plaintiffs' action has not arrived.

Our decision must then be that the three suits of the plaintiffs are premature; that their cause of action, as regards any evicting subsequent to the

date of the lease, does not arise so long as the lease of Soorjo is running; and that these suits ought to have been dismissed.

We therefore dismiss appeals Nos. 37, 158, and 159 with costs in all Courts, without prejudice to the plaintiffs' right to institute fresh suits hereafter in a proper form and at a proper time, and we decree appeal No. 51 with costs of this Court, reversing the judgment of the Lower Courts, and dismissing the three suits entirely.

CASE 1450 OF 1867.

20th December.

Special Appeal from East Burdwan.

Moharajáh Dheraj Mahtab Chand Bahadoor, (Plaintiff) *Appellant, versus* Radha Benode Chowdhry, (Defendant) *Respondent.*

Before *Seton-Karr* and *Macpherson*, J. J.

Baboos Juggodanund Mookerjee, Chunder Madhub Ghose, and *Moonshee Ameer Ali* for Appellant.

Baboos Hemchunder Banerjee and *Mohinee Mohun Roy* for Respondent.

A suit by zemindar against putneedar for dâk charges, according to the putni jumma, lies in Small Cause Court.

In this case the respondent takes a preliminary objection, which, in our opinion, puts the appellant out of Court.

A case in which a zemindar sues a putneedar for dâk expenses, according to his putnee jumma, is a case of a nature cognizable by a Court of Small Causes, and as such, by Section 27 of Act XXIII of 1861, no special appeal will lie.

The suit is therefore dismissed with all costs and interest.

CASES, 320, 321, 328, 329, 331, 332, 337, 338, 350, 353, 355, 356, 359, 360, AND 369 OF 1866.

24th December.

Regular Appeals from Sarun.

Ram Shewak Roy and others, (some of the Defendants) *Appellants, versus* Sheo Gobind Sahoo and others, (Plaintiffs) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Baboos Unnodapershad Banerjee and *Kishen Succa Mookerjee,* and *Mr. R. V. Doyne* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Tarrucknath Sein* for Respondents.

(1). A Hindoo widow after alienating to strangers all the property of which she became life-renter at her husband's death, executed an ikrar conveying the whole to her husband's heirs. *Held*, that she had, in fact, nothing to convey, and her alienations would hold good in any case till her death, before which time, indeed, the heirs to the estate could not be properly determined.

(2). Where the family is under Mitakshara law, alienations by the widow in possession, as above, can be set aside by the husband's heirs at

Phear, J.—The above sixteen cases of appeal arise out of two suits of ejectment, the first brought by Sheogobind Sahoo and Ajnassee Koomar, as co-plaintiffs, against some one hundred and sixty-one defendants, to recover certain land in the district of Sárun, and the other by Deocoomar Singh against the same defendants, with slight variation in respect of the same land.

The facts, so far as they are necessary to render the matter of litigation intelligible, may be shortly stated as follows:—

The property in suit, which is very extensive, consists of a four-anna share in a considerable number of mouzahs, and it was formerly the separate estate of one Baboo Degumbur Singh. On his dying very many years ago, without leaving any issue surviving him, his widow Balcoomar took the property for the estate of a Hindoo widow. She was young at that time, but she lived to attain a great age, and only died so lately as the 13th November, 1853. During the early part of her widowhood she encumbered, or made away with, the whole of the property in question, and the substantial defendants in these suits are her alienees, or their representatives, claiming under conveyances which all date back more than twenty-five years. At the death of Degumbur, it seems that Rajcoomar Singh, Moharaj Singh, and Jubraj Singh, the three minor sons of his deceased brother Nityanund, were his nearest of kin, and

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her death, unless they were made under the pressure of sufficient legal necessity.

(3). Examination of evidence as to the existence of such legal necessity in the cases before the Court.

entitled to succeed to his property, had the widow been then out of the way. Both Moharaj and Joobraj died during the lifetime of Balcoomar; the former had no issue, but the latter left a son, Gungapurshad, *alias* Ghusbeetun Lall, who, with his uncle Rajcoomar, survived the widow, and is a prominent figure in the present suits. The minors did not allow Balcoomar to remain in undisputed possession of the property, but sought, in an action brought by guardians on their behalf, to recover it from her, on the allegation that it was joint family property, not the separate property of her late husband. In this contention they entirely failed, and their suit was dismissed in March, 1813.

1813, March.

On the 28th September, 1853, just forty years after this event, and when, by the death of both Moharaj and Joobraj, Rajcoomar and Ghusbeetun Lall were left the sole representatives of the original plaintiffs, Balcoomar executed an *ikrar*, in which, after reciting, among other things, the foregoing litigation, also that an application for a review of the judgment, passed in 1813, remained still undecided, and then setting out the estate of the family, she went on to say:—"As the said Baboos (*viz.*, Rajcoomar and Ghusbeetun Lall) "bear nearer relation to my husband than to Baboo Otool Chand, deceased," (a collateral member of the family), "so they are undoubtedly entitled to the property of my husband in exclusion of all other heirs. For fear of God and of my own free will, I give up my claims to the heirship of my house, and without any diminution or increase. The right of my husband aforesaid I make over to the aforesaid Baboos, and put Baboos Rajcoomar Singh and Gungapurshad, *alias* Ghusbeetun Singh, son of Joobraj Singh (deceased) in possession of the entire property left by my husband as claimed in the inheritance case. I shall be satisfied with receiving from the Baboos the maintenance which the shaster allows to the widows."

1853, September 28th.

Balcoomar was advanced in age when she executed this document, and she died about six weeks afterwards, namely, as before mentioned, on the 11th November, 1853. On the very next day, *viz.*, the 12th November, 1853, Ghusbeetun Lall, by a kobala in which he recited the before mentioned litigation between the minor nephews of Digumber and Balcoomar, and also that he and Rajcoomar had since become the sole heirs of Digumber, and that Balcoomar, in the previous month of Assin, had executed the ikrar of relinquishment of Digumber's four-anna share, *viz.*, the property now in dispute, to him and Rajcoomar, as such heirs, conveyed the two-anna share which he held by such right of heirship to Rajcoomar absolutely in consideration of Rupees 20,000, part of which, namely, Rs. 15,000, was to be set-off against a debt of that amount due to Rajcoomar for money lent, and the remaining Rs. 5,000 were to be paid to certain unnamed creditors of him (Ghusbeetun Lall).

At the time of the execution of this kobalah the whole of Digumber's property was in the possession of persons who had purchased it, or taken it in mortgage from Balcoomar; also one Monohur Dass, the purchaser of a decree for money which one Bunnowarree Lall had obtained against Ghusbeetun Lall so long previously thereto as the 17th April, 1851, was seeking to obtain satisfaction of the decree by sale of the rights and interests of Ghusbeetun Lall in that property. In this state of things, namely, on 15th December, 1853, Rajcoomar intervened to prevent a sale being made, and, by a petition dated the 21st January, 1854, he argued at great length that the purchasers from Balcoomar, who had also intervened in like manner with himself to assert their claims, had no sort of right to the land in question; he mentioned the unsuccessful litigation of himself and brothers with Balcoomar, contending that the ultimate decision of the Court only left her the enjoyment of the property for life, without power of alienation. He stated that Balcoomar had on 28th September, 1853, executed in favour of himself and Ghusbeetun Lall, an ikrar purporting to be a renunciation of her husband's property to them, and that Ghusbeetun had afterwards executed a deed of absolute sale to him, bearing date the 12th November, 1853, in respect to the two annas, his own, "Ghusbeetun's, share out of the property left by the said Digumbur Singh.

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On those facts he maintained that at that time he alone had any interest in the four-anna share of Digumbur, and that it was nothable to be sold in execution of a decree against Ghusbeetun Lall.

The Civil Court of Sarun, which was charged with the execution of the decree by an order passed on the 21st April, 1854, after very clearly describing the position taken up by Rajcoomar, and showing that it depended on the validity of the bill of sale from Ghusbeetun Lall, rejected Rajcoomar's claim, on the ground that that bill of sale was *fabricated*, and collusively executed for the purpose of defeating Ghusbeetun Lall's creditors. Accordingly the execution proceedings were duly carried out, and Ghusbeetun Lall's rights and interests in the property in question were sold at sales which took place on the 5th December, 1854, and the 5th May, 1856. Ajnassee Koer now represents the persons who purchased at those sales.

Nothing further of importance relative to this property took place for the next four or five years, and meanwhile Rajcoomar appears to have died.

In 1861, Deocoomar, the only son of Rajcoomar, effected a sale of rights and interests belonging to him in Digumbur's property to one Sheogobind Sahoo, and, on the 14th December of that year, executed a conveyance of the same to him, in which the conveying words were :—" I sell and execute a bill of sale to Sheogobind Shahoo for Company's Rs. 2,000 of my right, title, and interest, by right of inheritance, in the property left by Digumber Singh, deceased, in respect of two annas share out of four annas of the mouzahs," &c, &c.

At this stage of matters then it appears that Ajnassee's predecessors had obtained such rights and interests in Digumber's four-anna share as Ghusbeetun Lall could transmit, and that Sheogobind had also got Deocoomar's rights and interests in the same property to the extent at least of two annas out of the whole four. It is important here to observe that Deocoomar's father, Rajcoomar, had, by his conduct in setting up the alleged conveyance of 12th November, 1853, and by his petitions of objection in December, 1853, and January, 1854, very distinctly represented that Ghusbeetun Lall had, by inheritance and by the operation of Balcoomar's ikrar, originally taken a two-anna share out of Digumber's four annas. If this were in fact so, Ajnassee's predecessors and Sheogobind would, as the effect of their several purchases, have become together entitled to the whole of Digumber's four anna share, subject only to such adverse rights as the purchasers from Balcoomar could establish against them. They themselves adopted this view of their rights, and accordingly, on the 31st December, 1861, in the first of the two suits of ejectment, from which these appeals arise, they jointly sued to recover possession of the whole four-anna share, making the alienees of the widow in possession and Deocoomar co-defendants in the case. The plaint which they filed set out the respective titles of the plaintiffs, that of the one referring to Deocoomar's moiety of Digumber's four-anna share, that of the other to Ghusbeetun Lall's moiety of the same, and in answer thereto, Deocoomar, by his written statement, disclaimed all interest in the share to which Sheogobind made title under the conveyance from him, at the same time remaining silent as to whether or not he supposed himself to possess any interest of the property sued for outside the portion covered by the conveyance. This case twice came up to this Court in appeal, and was twice remanded. The judgment of the Lower Court, on the second remand, was given on 30th June, 1866. The suit at that time was treated as two suits, one by Sheogobind, and the other by Ajnasee; and the Lower Court, while it dismissed Ajnassee's claim altogether, decreed in favor of Sheogobind to the extent of two annas. It is against this judgment that eight of the present appeals are brought, *viz.*, Nos. 320, 329, 332, 338, 353, 360, 369, each by certain of the defendants, and No. 355 by Ajnassee.

Pending this suit, and before its last remand by the High Court, namely,

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on the 27th October, 1865, Deocoomar himself brought a suit (the second of the two suits of ejectment referred to) against Sheogobind, Ajnassee, and the alienees of Balcoomar, to recover possession of the whole of Digumber's four annas. In his plaint Deocoomar admitted that he had previously sold 2 annas of this property to Sheogobind, and also the remaining two annas to one Mussamut Rowman Koer; but he maintained that the first of these sales was, for a reason given, ineffectual, and that the second moiety had been re-conveyed to him by the lady; so that he was then entitled to both portions. Afterwards, however, during the progress of the suit, he gave up his claim to the moiety which he had conveyed to Sheogobind, and from that time the suit became limited to his claim to the other moiety. The Lower Court gave its judgment in this suit also on the 30th June, 1866, decreeing, generally, in favor of Deocoomar's right to recover the moiety of the property which he sought by the suit in its amended form. The same persons appeal against this decree, as against the decree in Sheogobind and Ajnassee's case, the appeals being those numbered 321, 328, 331, 337, 350, 359, 368, and 356. Substantially, the grounds upon which the appeals are preferred in the two suits are, taking them, each pair, together, the same; so that, on the whole, we have before us, as the result of the two suits, a judgment in favor of Sheogobind for two annas out of the four annas, and in favor of Deocoomar for the remaining two annas, an appeal against this brought by Ajnassee, and seven other appeals against it brought by seven different sets of defendants in possession of the property.

This decision of the Lower Court is correct, if Deocoomar, just before and up to the execution of his conveyance to Sheogobind, was solely entitled to the whole of Digumber's four annas; and it cannot be supported on any other ground.

Now, during the life of Balcoomar, Rajcoomar clearly had no interest in this property other than what he may have taken under the ikrar; with this exception, he had at least an expectation of becoming entitled to the inheritance on the death of Balcoomar. On the other hand, Balcoomar, undoubtedly, when her husband died, took the whole inheritance for at least the estate of a Hindoo widow, and therefore she took it with the usual incident of the power of alienation, though it may be that this power was limited as against the persons who should be the heirs of her husband alive at the time of her death. Any conveyances made by her would give a good title to the inheritance, liable only to the superior claim of these persons when they should be ascertained; but inasmuch as they could not be, in fact, ascertained until the occurrence of her death, up to the time of the happening of that contingency, at any rate, her alienations would be effective. According to this view nothing can have passed by the ikrar to Deocoomar and Ghusbeetun Lall; for it is admitted on all sides that, long before its execution, Balcoomar had, for valuable consideration, parted with the whole of her husband's property, and therefore she had nothing then remaining in her which she could convey. This circumstance serves to distinguish this case from those cited before us, in which it is said to have been held that the conveyance by the widow to the existing heir of her deceased husband had in a manner accelerated the inheritance as against, so to speak, later heirs. Here, as it seems to me, the ikrar has no effect whatever as an instrument of conveyance. There existed nothing on which it could operate; neither was it in any sense a family arrangement which a Court of equity is bound to uphold, inasmuch as there was no matter of dispute settled by it, or indeed any other kind of consideration for it.

Then comes the question,—Did Rajcoomar become entitled to that property at Balcoomar's death, notwithstanding that lady's alienations. He was at that time the sole nearest of kin to Digumbur alive, and by Hindoo law, whether of the Benares or Bengal school, his sole heir. If the law applicable to the case were that of Bengal, it is admitted that the answer to this question would depend simply on the circumstances under which the alienations were respec-

tively made. But the law by which the parties are bound is that of the Mitakshara, and the appellants urge that, under that law, when the widow takes her husband's estate in default of male issue surviving him, she takes it as woman's property, descendible to her own heirs, instead of her husband's heirs, with complete power of alienation over it. This point was very ably argued before us; and if the matter were *res integra*, I should require much time for consideration before I should be able to come to the conclusion on the Benares texts that the appellant's contention is wrong. But it seems to me that the question has already been judicially decided by this Court. In the suit of Onoop Roy *versus* Goburdhun Nath, reported (as determined on appeal) in Vol. III., Weekly Reporter, page 105, a Division Bench of this Court, after reviewing or referring to most of the authorities which bear upon it, held distinctly that, under the Mitakshara law, as regards the immoveable property inherited by a widow from her husband, she has nothing but a life interest, and cannot dispose of it, except under peculiar circumstances and under certain restrictions. It further held that, on her death, it went to the heirs of her husband. It is true that the argument upon which the Court founded its judgment is not altogether satisfactory; for, by a curious mistake, due to the fact of a quotation having been made second-hand from Strange, instead of directly from Colebrook's Mitakshara, a leading passage of Dyabhaga is treated as if it were a passage from the Mitakshara; and it is not easy to say how far the opinion of the Court may have been biased by the erroneous supposition that what was in truth a characteristic Bengal text, was a correct enunciation of Mitakshara law. Still the Court in that case, deliberately setting aside the disposition of the property made by the widow, declared the husband's heir, living at her death, entitled to recover against her devisee, and as this decision seems to me strictly in point, I feel myself bound to be guided by it, because I am not prepared to express my dissent from it, and on that ground to make a reference to the Full Court.

Following this precedent, it appears to me that, on the death of Balcoomar, Rajcoomar became entitled to all Digumber's immoveable property which had been in her hands, excepting only so much as might have been disposed of by her under circumstances which would render her alienations valid against her deceased husband's heirs. He therefore at the same time acquired the right to bring a suit for possession against all persons who wrongly kept him out of possession of that property. He did not himself obtain possession, and Deocoomar, his son, admits that, since his father's death, he has conveyed his rights in two annas of Digumber's property to Sheogobind, so that, as between these two persons, each had a right to sue for recovery of a moiety of Digumber's estate, and subject only to such titles to the same as Balcoomar's alienees may be able to establish, each can show a good title against third persons, unless, on the facts as already narrated, it is to be concluded, either that two annas of Digumber's four annas was actually at the same time conveyed to Ghusbeetun Lall, or that Deocoomar is stopped from denying that it was so, in which case Deocoomar would have nothing left in him, and his place would be filled by Ajnassee claiming through Ghusbeetun Lall. There is, however, nothing but the ikrar of Balcoomar which can be suggested as an instrument of actual conveyance to Ghusbeetun Lall; and I have before pointed out why I consider that document to have passed nothing. But it is said that Rajcoomar, by accepting that ikrar, and afterwards taking a conveyance from Ghusbeetun Lall of his share thereunder, and still more, by his publicly founding on this ikrar and conveyance an objection in open Court to the sale of Ghusbeetun's moiety of Digumber's estate, so asserted Ghusbeetun's right to that moiety as that he cannot now set up his claim to the same against the purchasers at Ghusbeetun Lall's execution sale. I do not think that this contention can be supported. It seems to me, on the facts, that Rajcoomar, and indeed until very lately, all parties, laboured under the erroneous impression that Ghusbeetun Lall, after the death of Moharaj Singh, without issue, became sole co-heir with his surviving uncle to Digumber's property, and that as

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such he became entitled to a moiety of it in possession by the relinquishment of Balcoomar; so that, whatever might have been the motive with which the conveyance from Ghusbeetun was framed, the representatives of Rajcoomar as to Ghusbeetun Lall's title were in no way fraudulent; nor were they made with the least intention of inducing persons to purchase at the execution sale. On the contrary, the action taken by him was intended to prevent the sale from being carried out, and I see nothing in the shape of an estoppel between him and the purchasers at that sale to bar him from setting up the truth against them, as soon as he might become aware of it. If this be so, Ajnassee, the present representative of these purchasers, cannot effect any defence against the case made by Deocoomar in the suit wherein he is plaintiff, and still less can she succeed in the suit brought by herself against Balcoomar's alienees in possession, because she cannot produce any evidence at all, not even the evidence of possession, that Ghusbeetun Lall had any right, title, or interest in the property which she claims through him. I think, therefore, that the Court below rightly decided against her in both suits, and that her present appeals, Nos. 355 and 356, must be dismissed with costs.

It remains to be seen whether any of the other seven sets of appellants can, so far as concerns themselves, properly impeach the decrees passed in favor of Sheogobind and Deocoomar respectively. Some of these appellants took a preliminary objection of Deocoomar's suit, alleging that it was barred by the law of limitation. They maintained that the cause of action accrued upon the execution of Balcoomar's ikrarnamah on the 28th of September, 1853, while the plaint was certainly not filed until the 27th October, 1865, *viz.*, after the lapse of twelve years and one month from that date. However, as I have already said in my judgment, the cause of action on which Deocoomar sues first accrued to his father Rajcoomar on the day when Balcoomar died, namely, the 11th November, 1853, and consequently the suit instituted upon it in October, 1865, is within time. It was also urged on behalf of more than one set of appellants, defendants in possession, that Deocoomar's own evidence showed he had no title to any portion of the land in question at the time of bringing his suit; for, by his own account, he had previously conveyed one moiety of the four annas to Sheogobind, and the other to Mussamut Rowman Koer; and they argued that he had wholly failed to make out that the alleged reconveyance to him by the Mussamut had been effected before the filing of the plaint. The whole of the materials on which the plaintiff relied for evidence on this point were—*first*, the testimony of himself given on oath during the trial of the cause, in which he said that the two annas were re-transferred to him by Mussamut Rowman Koer in Kartic, 1273; *secondly*, the statement of his pleader, not on oath, that the re-transfer took place a fortnight before the plaint was filed; and, *thirdly*, a petition filed in this suit on 19th April, 1866, by Mussamut Roman Koer, (not a party thereto) by which she disclaimed all right to the property, on the ground that she had received back her purchase-money. Obviously, neither this petition, nor the pleader's statement, is admissible as evidence of the reconveyance as against the defendant in this suit, and therefore the plaintiff's testimony alone is all the evidence bearing on this point, which we can rightly consider. It must be confessed that this is exceedingly unsatisfactory. All the plaintiff says is that the re-transfer was made in Kartic; and as the last day of Kartick in that year was the 4th of November, it is consistent with his statement that the re-transfer should have occurred a whole week after the filing of the suit. Also the plaintiff does not mention the form in which the re-transfer was effected, *viz.*, whether by a written document or by parol agreement. If it was in the former shape, the document itself is the primary evidence of the fact, and ought to be accounted for, before we should receive the plaintiff's parol version of it. However, it lay upon the defendants to elicit these things by cross-examination of the plaintiff. As they have not chosen to do so, we must take the plaintiff's testimony, for as much as it is worth, and meagre as it is, it certainly affords some evidence in support of the

reconveyance having been made by Mussamut Roman Koer as alleged in the plaint. On the other hand. there is not a tittle of evidence of any sort to rebut it. Under these circumstances, I think this last mentioned objection of the appellants falls to the ground equally with the plea of limitation. As there are no other objections by way of bar to the suits presented to us, and persisted upon, this conclusion disposes of all the appeals which do not raise a defence on the merits of Balcoomar's alienation. This is the case with appeals Nos. 320, 321, 331, 337, 338, 359, and 360. These appeals must therefore be dismissed with costs.

The appellants in Nos. 328 and 329 say that their predecessors in title bought from Balcoomar under circumstances which are sufficient to protect them in their possession. It appears that Balcoomar had borrowed money on the security of a zuripeshgee lease of the land, reciting in the lease that the money was required for the purpose of paying the Government revenue. The creditor afterwards brought a suit against the lady to recover his money, and obtained a decree. A sale took place in execution of this decree, and at that sale the appellant's predecessors bought. It is now argued that the recitals in the zuripeshgee lease, the decree, and the execution sale proceedings, are facts which go so far as to prove a binding necessity for the alienation, or at least show a reasonable justification for a presumption on the part of the purchaser that there was such a necessity, and therefore are sufficient to give him a good title against Digumber's heirs. However, we learn that the creditor did not sue on the basis of the zuripeshgee transaction; that indeed he did not sue at all, until, for some reason or another, he had lost the power of availing himself of the zuripeshgee security, and then he brought his action against Balcoomar personally on her simple money-debt to him. The decree which he obtained in that suit could not, and did not in the least, touch Digumber's estate, but merely ordered Balcoomar to pay her debt; and the sale in execution, which followed thereon, was merely a sale of the lady's rights and interests in the property. It is therefore clear that the whole foundation of the appellant's argument disappears, and we are not called upon to say whether the recitals in the zuripeshgee could in any case have been taken as evidence of necessity against the claims of the heirs. The appeals Nos. 328 and 329 must be dismissed with costs.

The appellants in Nos. 368 and 369 objected that the Lower Court was wrong in holding that the sale by Balcoomar, upon which their title depended, was not justified by necessity. They relied upon the recitals in the bynamah from Balcoomar, dated 25th December, 1844, which the Lower Court refused to admit as evidence, on the ground that it was not proved. They also desired permission of this Court to put in as evidence of the necessity of the sale, certain Collectorate challans which had been omitted to be tendered in the Court below, and which purported to acknowledge the receipt of Government revenue in December, 1844, in respect of the portion of the property held by the appellants. I see no reason for saying that the first Court erred in rejecting the bynamah; and as to the challans, it is clear that they speak to nothing but the actual receipt of the money on account of revenue, the person who paid it, and the estate for which it was paid. But, inasmuch as the Collector, as a matter of duty, receives without question money tendered on account of Government revenue when due from any hand whatever, and from as many hands simultaneously as chose to offer themselves, the mere fact of receipt can afford no evidence of the cause which led to the payment. And in this particular instance the appellants do not, by any evidence, identify the name which is mentioned in the challans as that of the person paying the money for the revenue with the purchaser from whom they claim, or any one acting on his behalf. So that, in truth, the challans sought to be used here stand altogether unconnected with the transaction of the purchase, and cannot give the least clue to its character. I think therefore that they are inadmissible. It results then that the appellants in these cases have no evidence upon which to base their arguments, and that these appeals must be dismissed with costs.

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In appeal No. 350, Deocoomar, and in that of No. 358, Sheogobind and Ajnassee, complain that the Lower Court has, without sufficient evidence, found a certain specified alienation of Balcoomar's to have been justified by necessity. The evidence bearing on the point consists of recitals in the deed of sale which the purchaser obtained from Balcoomar, and also the Collector's challans similar to those which have just been commented upon. The recitals state that the property covered by the deed was sold to discharge a lien upon it created by Balcoomar in favor of a third person by a certain zuripeshgee lease, but they do not mention anything in the shape of justification for the imposition of this lien. If, therefore, the recitals of the vendor cannot be appealed to by the vendee as evidence of the necessity for the sale, or of his, the vendee's, honest belief in its existence, which possibly may be questioned, still, in this instance, the recitals do not go far enough, and, in truth, amount to nothing in the appellant's favor. The zuripeshgee lease itself is not proved. Then the challans, for the reasons already mentioned, are valueless, and so it seems to me the appellants are right in contending that the decision of the Lower Court on this point is without any evidence to support it. The appeals Nos. 350 and 353 must therefore be decreed generally with costs. It seems, however, to be admitted that the appellants have named in their petitions of appeals two persons, *viz*, Ramanund and Ramapurshad, as respondents, who were not parties to the suit in the Court, and who have not been made parties since the trial. These nominal respondents have appeared in obedience to notice given by the appellants; but they appear under protest, and ask for their costs. I think that they are entitled to their costs, and also that the appeal record should be amended by striking out their names therefrom.

Bayley, J.—I concur in the decision of these sixteen regular appeals in the manner set forth by Mr. Justice Phear, that is to say, I think the ikrar cannot affect the case against the alienees, for Balcoomar made that deed when she really had nothing to pass to Rajcoomar and Ghusbeetun. I do not think she could declare who were her heirs, as she does in that ikrar, till they became so legally by her death. She might survive one or both of them, or various other contingencies might arise. In respect to the real property becoming Balcoomar's as woman's property, and so passing, under Mitakshara law, to the heirs of the woman, and not reverting to the husband's heirs, I think that the widow takes the real estate only as part of her deceased husband for her life; and while on the one hand she can make alienations under legal necessity, still, on the other, such property does not go, like *peculium*, to the woman's heirs, but to the heirs of the husband, from whom alone the widow derived it.

There is no reason or evidence to support the contention that Rajcoomar objected to the sale in execution in fraud, or that Ghusbeetun had any right in the property after his sale of it to Rajcoomar.

I would dismiss appeals Nos. 355 and 356 accordingly.

I agree, for the reasons before given as to the right accruing to Rajcoomar from the death of Balcoomar, that the cause of action arose then, 11th November, 1853, and the suit is admittedly within twelve years of that date.

As to Deocoomar's having no title when he brought the suit, owing to his having stated that he had conveyed half, two annas, of the jumma to Sheogobind and half, two annas, to Mussamut Rohiman, we have at least his oath to the fact of reconveyance from the latter. I think this evidence might be ordinarily insufficient to prove this reconveyance, especially as the deed is not put in. But here there is, at least, that deposition on oath on one side, and nothing whatever on the other. I, in concurrence, then, with Mr. Justice Phear, would dismiss appeals Nos. 320, 321, 331, 332, 337, 338, 359, and 360.

As to Nos. 328 and 329, I think that the recitals in the zuripeshgee would not, of themselves alone, be sufficient evidence of legal necessity. But this does not arise, for what was sold was merely rights and interest for a person's money liability.

As to Nos. 368 and 369, the only evidence of Collectorate challans would merely show that a certain person paid certain Government revenue due on

account of a certain mehal. But legal necessity and enquiry into it must be better shown than by such alone.

I therefore concur in the judgment of Mr. Justice Phear in the whole sixteen cases.

Decree accordingly.

Regular Appeal from the 24-Pergunnahs.

CASE 151 OF 1867.

3rd January.

Mr. F. Woodhouse (Plaintiff) *Appellant, versus* The Calcutta and South-Eastern Railway Company, (Defendants) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Messrs. C. G. Paul and *T. Stokoe*, and *Baboo Obhoy Churn Bose* for Appellant.
Mr. A. Fergusson for Respondents.

What amounts to negligence on the part of a Railway Company such as to render them liable in damages for accidents caused thereby. Insufficient lighting of a station, overshooting the platform, failure to warn passengers not to alight at the wrong place, all held to be sufficient acts of negligence for the purposes of the suit for damages.

The appellant in this case was the plaintiff in the Court below, and sued to recover damages from the defendants for injuries received by him while travelling as a passenger on their line of railway.

On the evening of the 2nd of December, 1866, the plaintiff was a passenger in a train from Mutlah to Ballygunge, which is a station intermediate between the Railway termini at Mutlah and Calcutta. The train reached Ballygunge about 6-30 P. M., when it was quite dark. The plaintiff was travelling in a first-class carriage in company with two gentlemen—Mr. Schiller and Captain Jervis. On the train stopping at the station, Mr. Schiller and Captain Jervis got out, opening the door of the carriage for themselves. The plaintiff proceeded to follow them. He was in the act of putting his foot to the ground, when Jervis called to him to take care, as the train was moving. At the same moment almost his foot touched the ground, and he felt that the train was moving back. In the darkness he could not see the platform distinctly; and being afraid to alight, he tried to stop himself and to recover his position on the step of the carriage. In attempting to recover himself, he slipped, and fell between the platform and the train. The consequence was that his leg was broken, and he received other serious injuries.

As to these general facts there is no dispute.

The plaint alleges that the accident was caused by the negligence of the Railway Company, *firstly*, in not keeping the station sufficiently lighted; *secondly*, in "so negligently attending to" the place whereon passengers had to alight, that the same was unsafe for passengers alighting; and, *thirdly*, in putting the train in motion as the plaintiff was alighting, and without notice to him after the train had stopped, for the purpose of allowing passengers to alight.

The defendants, in their written statement, deny that there was any negligence on their part, and plead that the accident was attributable to want of care and ordinary prudence on the part of the plaintiff.

The Judge who tried the case, without finding as a fact that the station was properly lighted, or that the condition of the platform and station generally was such as it ought to be, was of opinion that neither the condition of the station, nor the want of lights, caused, or aided in causing, the accident. He held that the accident was to be ascribed primarily to the moving of the train as the plaintiff was in the act of alighting; but he held that, at the time the plaintiff tried to get out, the train had not stopped for the purpose of allowing passengers to alight; that the plaintiff had no sufficient reason for supposing it had stopped for that purpose; that the defendants were justified in putting the train in motion when they did; that there was no negligence on the part of the defendants such as to make them liable for damages; and that there was such want of care and prudence on the part of the plaintiff as to disentitle him from claiming damages.

The suit was accordingly dismissed with costs.

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In appeal, it is contended, on behalf of the plaintiff, that the accident was caused solely by the improper moving of the train after it had once stopped, the want of lights, and the dangerous state of the platform; that at the time the plaintiff began to alight, he had every reason to believe that the train had stopped for the purpose of allowing passengers to alight; that if the train had not then stopped for that purpose, notice should have been given to the passengers that the train was about to be backed, and that the train ought not to have been put in motion without such notice.

As regards the question of the unfinished and dangerous state of the platform, we think it is very clearly proved that a large portion of the platform was in an unfinished and most dangerous state, and that the Railway Company was guilty of the greatest negligence in allowing a platform in such a condition to be used at all without having taken the most simple precautions, both in the way of lighting and otherwise, for the safety of persons using their Railway. Mr. Shanks, the Acting Agent of the defendant Company, says:—"In December last the facing wall of the station (*i. e.*, platform) was complete. At the back of the wall there was earth-work up to within five inches of the top of the wall. The thickness of the wall is fifteen inches. A man stepping out of a carriage would first step on to the brick wall, and then on to the earth." Mr. Schiller's evidence is to the same purport.

It seems to us that a Railway Company can scarcely be guilty of any more gross or dangerous negligence than to leave in darkness a station which is in such a condition that a wall fifteen inches wide, with a drop of five inches to the earth on the further side of it, is all that passengers have to alight upon. We think, however, that the injuries which the plaintiff received are not proved to have resulted from the condition of the platform. There is no very distinct evidence on the subject, but the conclusion at which we arrive, on the whole, is that the carriage from which the plaintiff attempted to descend stopped, not opposite the unfinished portion of the platform, but opposite a portion which had been completed, and was in good order. Mr. Pendleton, the Agent of the Railway Company, swears that, on the morning after the accident, he examined the platform, and a spot, about twenty yards from the Calcutta end of the platform, was pointed out to him by the Station Master as that at which the accident occurred. But Mr. Pendleton himself was not present when the accident happened, and what the Station Master told him is no evidence, especially as the latter was not called as a witness, although (as Mr. Fergusson, who argued the case for the respondents, told us) he was present in Court at the trial. Mr. Pendleton, however, says, speaking from what he himself saw on the morning of the 3rd of December, that from the Calcutta end of the platform to the commencement of the new platform, which he supposed was about 200 feet, nearly the whole of the platform was in good order. As Mr. Schiller and the Engine Driver agree in laying the scene of the accident close to the Calcutta end of the platform, we cannot say it is proved that what occurred was owing to the improper or unsafe state of the platform.

But it appears to us to be proved conclusively that the station, at the time of the accident, was most insufficiently lighted, and that the negligence of the defendants in this respect was one of the main causes of the plaintiff's falling as he did.

We think the reasoning of the Judge below on this point is very fallacious. It may be true that Schiller, as he entered the station, could, notwithstanding the darkness, recognise the buildings sufficiently to know that he had arrived at Ballygunge. It may also be true that, after he got out of the carriage, he was able to see to some extent what the plaintiff did. All this, however, he might have very well done if there had not been a light of any sort in the station. First-class carriages, moreover, usually carry lights; and it may be that the light from the carriage in which he had been travelling showed the plaintiff's position more distinctly than it would otherwise have been visible.

The night "was dark and smoky," as the Engine Driver Maxfield says by way of excuse for having overshot the station. Yet there were no lights

of any descriptions in the station, save what is called a "reading lamp" in the Ticket Office, and two common hand lamps (such as Railway officials of the like class generally use) held by the Station Master and the peon respectively. The Guard of the train no doubt had a lantern too; but that really does not affect the question of the sufficiency of the station lights, especially, as it is in evidence that neither the Guard nor his lamp had left the break-van at the time of the accident. Some attempt had been made to show that the reading lamp was so placed as to be of use in giving light to the platform. It is very doubtful whether, on the evening of the 2nd December, 1866, it was so placed. But, granting that it was, it still remains wholly impossible for us to say that, even supposing the platform to have been in good order, the station was lighted in any degree to such an extent as the safety of passengers demanded. It is not enough that the lights should be sufficient for the Railway Company and their own servants who know the premises; they must be enough to guide and direct strangers who are unacquainted with the station. (*See* Markin *versus* Great Northern Railway Company, 16 C. B., 180.)

In the present instance, the station was practically left in the dark, so far, at any rate, as the plaintiff was concerned. This darkness was, as it seems to us, of all things the most likely to cause the plaintiff first to hesitate on the step of the carriage, and then to fall as he did. It may be easy enough for a man to step on to a Railway platform from a moving train when he can see what he is about; but it is a very different thing for him to take a similar step in the dark, especially if he is ignorant that the train is in motion. The plaintiff says:—"I was looking towards the ground. I was not aware that the train had got past the platform. I could not see the platform when I looked down. I supposed there was a platform, because two others had got out. I could not see the ground. I could not see anything." And again he says:—"I do not know whether the train had stopped when Schiller and Jervis got out. It had stopped when I got out. I know that the train must have stopped, because it was backing when I attempted to get out. No doubt it had stopped some time before that. I did not know it was backing until I put my foot on the ground." The plaintiff, in the belief that the train was standing still, commenced to alight. He could not see, owing to the darkness, that the train was moving slowly backwards. Just as he was about to put his foot on the ground, Captain Jervis called out to take care, as the train was backing, and almost at the same moment his foot touched the platform, and he felt the motion for which he was unprepared, when he began to put his foot out in order to step on the ground. Taken by surprise in this manner, it is in no degree wonderful that he hesitated and wished not to complete the step which he had meant to take, and tried to recover his footing on the carriage. Had the platform been lighted, as it should have been, he could have seen, from the first, that the train was in motion; he would have seen and understood what he was about; and he would have had that confidence which one acting in the dark could not have.

Then was there any negligence on the part of the defendants in backing the train as they did?

We agree with the Court below in finding that, as a matter of fact, the train, at the time when the plaintiff attempted to get out, had not stopped for the purpose of allowing passengers to alight. But we do not concur in the view apparently taken by Lower Court on the question of negligence as connected with the overshooting of the platform by the train. We have no doubt whatever that the mere fact of a train overshooting a platform at which the the driver has orders to stop, is, in itself, *primâ facie* evidence of negligence. Under ordinary circumstances, if there are proper signals, and the engine and the rails are in good working order, a careful driver has not the smallest difficulty in stopping a light train, such as that in which the plaintiff was travelling, at the proper moment. The Judge says that it is a common occurrence for trains to overshoot the mark, and then move back. This may be true, as it is also doubtless true that Railway officials are frequently guilty of

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very gross irregularities and neglects of duty, whereby they needlessly endanger the lives of hundreds of passengers. But the negligence is none the less, and none the less culpable, because frequently repeated.

We do not mean to say that the overshooting of a station may not be perfectly excusable, and the result of circumstances which may defy the efforts of the most careful and skilful of drivers; for example, it is well known that in certain states of the weather the rails are in such a slippery condition that the breaks and other means ordinarily used to stop the train fail to produce that effect. In the present case, however, there is really no reason given for the train not having stopped when it ought to have done so. The driver can assign no better reason than that it was dark and smoky,—a reason which, with reference to the same place, probably would apply equally to almost every other night during the cold season on which there did not happen to be moonlight. But the driver mentions a fact which may possibly be the real cause of his having been too late of pulling up,—the fact, namely, that there were no proper signals in use at the station. He says (and he is confirmed by Mr. Shanks) that there were no fixed signals, and no regular signal post, at the station, but that the custom was to hold up a green light at the end of the station. Without saying that the want of proper signals was the reason why the train overshot the station, we find that no sufficient excuse for the overshooting is proved. We think that the defendants were guilty of negligence, therefore the train overshoot the platform. That it did so overshoot the platform was unquestionably the primary cause of the disaster which befell the plaintiff.

But, supposing there was no negligence, the overshooting of a station is an occurrence which necessarily is likely to produce great danger to passengers who are about to alight; and the least that a Railway Company are bound to do if such an event does happen, is to take every possible means to divest the occurrence of its dangerous consequences. One obvious precaution is to warn passengers to sit still, and that the train is about to be backed; and in the case now before us, we think that there is great negligence on the part of the servants of the Railway in not warning the plaintiff and other passengers that the train was about to move, and that they must keep their seats. The carriage in which the plaintiff was seated was drawn up opposite to the platform where passengers usually alight. The servants of the Company saw, or ought to have seen, that during the few moments that the train stood still, two passengers got out. If it were unsafe or wrong for them to get out, then they should have been prevented from so doing, or warned not to do it. But no objection whatever was made when Mr. Schiller and Captain Jervis alighted. What then was the reasonable and natural course for the plaintiff to pursue under the circumstances? He knew nothing of some of the carriages having gone beyond the end of the platform, or of the intention to back the train into the station; he felt that the carriage had stopped; he saw two fellow-passengers get out safely, and without any objection or remonstrance on the part of the Railway officials. Why should he have doubted that the right time had come for him to alight? Was he to sit still in his carriage and say to himself:—"Though the train is at a standstill opposite to the platform, and though these passengers have got out and gone away safely, I am not actually certain that the train has stopped in order to allow passengers to alight. Therefore I shall sit still until some of the Railway officials come and tell me it is safe for me to get out?" Such a course would have been entirely contrary to the usual practice of travellers, either in this or in any other country, and certainly, upon the evidence, wholly contrary to the usual practice (apparently never objected to by the defendants) of first-class passengers upon the defendants' line. The plaintiff's case is not even that of a person who himself opens the door of a Railway carriage, and is the first to step out, for here the train was actually at a stand-still. Other passengers had opened the doors, and had alighted safely, and without any indication on the part of the Railway Authorities that they ought not to have done so, and the plaintiff had no notice, and no reason to suspect that the train was going to be moved back. We say he had no reason to suspect the train

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was about to move, because the plaintiff swears he never heard any whistle; but even if he had heard it, it would be impossible for us to say that it would necessarily have conveyed to his mind the information which the driver intended to convey. We think that as the train had stopped, and as other passengers had got out safely, and there was nothing to lead any man in the exercise of ordinary care to suppose that they ought not to have done so, the plaintiff was justified, and acted as any reasonable and careful man would have acted, in thinking that the proper time for alighing had arrived. We think there was no such want of care or prudence on the part of the plaintiff as to disentitle him to damages.

It is not because possibly the plaintiff might have exercised more care than he did that therefore his right of action or his remedy is barred; nor, even if there had been a certain amount of negligence on his part, would that necessarily be an answer to his claim. The question really is whether the plaintiff did or did not exercise ordinary care. (Davis *versus* Maim, 10 M. and W., 546.) In a recent case (Stapley *versus* the London Brighton and South East Railway Company, L. R., 21,) the Court of Exchequer refused to disturb a verdict for the plaintiff, although the person injured had been guilty of far greater negligence than could possibly be attributed to the plaintiff in the present case, even supposing there was some want of care and prudence in what he did. In that case the negligence on the part of the Railway was that a gate at a level-crossing was left open, and the gate-keeper was absent at a time when an express train was overdue. The person injured passed on to the line, and was knocked down by the train which came up at the moment. A verdict was given against the Railway Company, although it was proved that the person injured might have seen the train approaching if he had chosen to look.

We have some difficulty in dealing with a case like this where numerous questions of fact are so closely mixed up with questions of law. The rule we apply is that which has been acted on in many cases in England, and is stated by Erle, C. J., in expressing the opinion of the majority of the Judges in the case of Scott *versus* London Dock Company, 34 L. J. Ex., 220, where he said:—"There must be reasonable evidence of negligence. But when the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

On the whole, we think that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting; and we think that the injuries sustained by the plaintiff were caused by that negligence, and that the plaintiff did not, by his own want of care, contribute to the accident.

There remains the question of damages. The evidence on this point is not so satisfactory or precise as it might have been. It is, however, undoubtedly proved that the plaintiff, at the time of the accident, was a Bill Broker, with a good business, and making a considerable income; that the effects of the accident were such as to disable him wholly from work for four or five months; and that, even after that time, he would not be able to attend to business so fully or profitably as before. When we consider, in addition to this, the amount of personal suffering he has gone through, and the fact (deposed to by Dr. Macnamara) that there will probably always be a stiffness of the leg which was injured, we feel assured that we are not assessing the damages too much on the plaintiff's favor when we assess them at Rupees 10,000.

We think the decree of the Court below ought to be reversed, and that a decree ought to be given for the plaintiff with Rupees 10,000 damages, and all costs (as in a suit for Rupees 10,000) both here and in the Lower Court.

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CASE 1532 OF 1867.

Special Appeal from Beerbhoom.

Radhabullub Gossain and others, (Defendants) *Appellants, versus* Kishen Gobind Gossain, (Plaintiff) *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Ishur Chunder Chuckerbutty for Appellants
Baboo Tarrucknath Sein for Respondent.

Plaintiff having been dispossessed by defendant, sues for recovery of possession. After plaintiff has proved the facts of possession and dispossession, it is for defendant to prove his title, before plaintiff can be called on to show title at all.

The plaintiff in this case sued to recover possession of certain homestead land which he alleged had been purchased by his brother Gungagobind Gossain from Khettermohun Napeet. His brother held possession till his death, and was succeeded in possession by the plaintiff, who held that possession through one Nilmonee. He alleges that he was ousted by the defendant in Bhadro, 1271, who carried off the thatch of the house, and have since retained possession.

The defendants allege that the land appertains to their lakheraj property; that Khettermohun held it on a condition of service, *viz.*, of shaving the members of the defendant's family, and that he had no authority to sell it; that after he had left the homestead, they held possession through Nilmonee.

The Courts below have given plaintiff a decree for possession, and the value of the thatch carried off by the defendants, holding that plaintiff had proved his possession and dispossession

The defendants, in special appeal, urged that as plaintiff sought to recover possession from their hands, plaintiff was bound to prove his title. A further objection to the decree of the Lower Courts is raised by Radha Gobind, defendant No. 5, to the effect that, as he is not charged with ousting the plaintiff, and was not originally a party to the suit, but was made so on the representation of the other defendants, it was wrong to give a decree against him, and he is entitled to his costs.

We think the first objection taken by the special appellants is not tenable. The plaintiff has proved possession and illegal dispossession. This was sufficient to shift the *onus* of proving the title upon the defendant in the first instance; and had they succeeded in establishing their title, the plaintiff would have been required to prove his. The judgment of the Privy Council, reported at page 12 of Vol. VI, Weekly Reporter, and the decision of his Court in Vol. VII, Weekly Reporter, page 174, lay down this as the proper course to be followed in cases where illegal ejectment is proved. We therefore reject the special appeal with costs.

On the ground taken by the defendant Radha Gobind, we think he must get a decree. He was not charged by plaintiff with dispossessing him, and he was made a defendant in the course of the suit, but at whose representation we do not clearly see, as the whole record is not before us. Nothing, however, is proven against him. He must be released, and his costs must be paid by his co-defendants.

CASE 1597 OF 1867.

4th January

Special Appeal from Mymensingh.

Goluckmonee Dabea, (Plaintiff) *Appellant, versus* Ramsoondur Chuckerbutty, (Defendant) *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Hemchunder Banerjee for Appellant.
Baboos Kallypursonno Dutt and *Anund Chunder Ghosal* for Respondent.

The mere fact that there is a mortgage clause in the bond, upon which bond a simple money decree is given,

Mitter, J.—The special appellant in this case had purchased at a sale in execution of decree the right, title, and interest of Kally Bhyrub Chuckerbutty and others in a certain rent-free holding, which forms the subject-matter of the present litigation. The special respondent having purchased a decree obtained

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by a third party against the same judgment-debtors, put up the property again for sale. The special appellant thereupon preferred objections to the sale under the provisions of Section 246 of the Procedure Code; but these objections were disallowed by the Court in the execution department, upon the ground that the property in question was mortgaged to the vendor of the respondent by the bond upon which the said decree was founded. The present suit has been accordingly brought by the special appellant for obtaining a declaration, to the effect that the property purchased by him ought not to be sold in execution of that decree. The Lower Appellate Court has dismissed the suit, holding that the respondent had a lien upon the property, and was therefore competent to execute his decree against it. In special appeal, the following points have been urged before us :—

will not enable the decree-holder to enforce such decree upon the property mentioned in the bond, if it has passed into other hands than those of his judgment-debtor. He must sue specially to enforce his lien.

First.—That the decree purchased by the respondents was a simple decree for money, and nothing more.

Second.—That in execution of such a decree, the respondent is not competent to seize a property which no longer belongs to his judgment-debtors.

We are of opinion that both these contentions are sound. On referring to the decree in question, we find that it was an ordinary decree for money passed against Kally Bhyrub Chuckerbutty and others. There was no declaration for the enforcement of any lien upon any particular property. The bond upon which the suit was brought contained a mortgage clause, but the decree is altogether silent about it. Under such circumstances, it is clear that the decree, as it stands, cannot be executed against any property which no longer belongs to the jupgment-debtor against whom it was passed. Whether, as a purchaser of this decree, the respondent has a right to fall back upon the mortgage lien created by the bond, or not, or whether that lien is still subsisting, we do not think it necessary to determine in this case. The respondent can, if he chooses, institute fresh proceedings against the special appellant for the enforcement of this lien; but we are clearly of opinion that the decree, as it stands at present, cannot be executed against a property which has come to the hands of the special appellant under an honest and *bonâ fide* title. This case could never have arisen if the Lower Court had not, in the execution department, totally disregarded the provisions of Section 246 already alluded to. That Section distinctly provides that, on an objection being preferred to the sale of any property in execution of decree by any person other than the judgment-debtor, the only question which the Court should enquire into is whether the judgment-debtor is in actual or constructive possession of the premises advertized for sale on his own account and for his own benefit. Now it is admitted that the judgment-debtor was not in possession of the property at the time of attachment; and if that Court had done its duty, the property would have been at once released, and the respondent would have been obliged to follow the very course which we have indicated above, as the only course open to him under the circumstances of the case.

We decree this special appeal with costs.

Special Appeal from Gya.

CASE 1633 OF 1867

4th January.

Mukbool Ali and others, (Defendants) *Appellants, versus* Zur Banoo Bebee and others, (Plaintiffs) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J J.

Messrs. R. E. Twiddle and *C. Gregory* for Appellants.

Baboos Chunder Madhub Ghose, Kaleemohun Doss, and *Romeshchunder Mitter* for Respondents.

The plaintiff sues to get possession of certain landed property left to her by her mother according to the schedule at foot of the plaint, and alleges that she succeeded to possession, and was illegally ejected by the defendants.

Where a cross-appeal is filed, it reopens the case only as against the original

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appellant, and not as regards the co-respondents of cross-appellant, respondent.

To enable us properly to understand this case, it is necessary to refer to the pedigree of the family. Asudoollah died, leaving five sons, of whom we need mention only two—Ruheem and Meeroollah. Ruheem married Bebee Jer, and had by her a son, called Ibrahim, and a daughter, Zur Banoo, the plaintiff. Ibrahim had a son, Bahadoor, who left a daughter, Rahmut Bebee. It is alleged by the plaintiff that Ibrahim and Bahadoor lived in commensality with her mother Bebee Jer, who outlived them, and succeeded to the whole estate belonging to her husband, son, and grandson; that she died in Bhadro, 1270, and was succeeded in the property by the plaintiff, who retained possession till ousted in Kartick, 1271, by the defendants, who, with the exception of Ruhmut Bebee, are descendants of Meeroollah, the other son of Asudoollah, mentioned above.

The defendants state that Ruheem died in April, 1832; that neither Bebee Jer, nor the plaintiff, held possession; and that plaintiff's suit is barred by limitation; that the property was held successively by Ibrahim and Bahadoor; and that the latter, under a deed of exchange dated Assar, 1261, gave up his rights in all the other villages which came to him from his grandfather, and received twelve annas six dams of mouzah Myra in exchange from the defendant.

The suit was first dismissed on the plea of limitation, but on appeal it was sent back for trial on its merits, and then the Sudder Ameen gave plaintiff a decree for the twelve annas six dams of mouzah Myra, holding the deed of exchange to be valid, and the transaction to be binding. It may here be remarked that plaintiff did not ask for this, but for a share in several villages; and, as far as we are aware, he did not make any reference to the exchange said to have been made by Bahadoor.

The plaintiff was satisfied with this, but Ruhmut Bebee, the daughter of Bahadoor, appealed, claiming Myra as the property of her father, and the Principal Sudder Ameen reversed the judgment of the first Court, and gave plaintiff a decree for a share in all the villages as claimed by her, with the exception of mouza Myra, to which he concluded that she had no right, as the plaintiff had, by partition, on 14th December, 1861, stated as much.

Mukbool Ali, and the other defendants whose interests have been affected by this decision of the Principal Sudder Ameen, have come up in special appeal, urging the plea of limitation against the plaintiff's claim, and abandoning the other grounds taken in their petition. But before going into their case, the Court found it necessary to examine the record to ascertain how it was that the whole case had been re-opened before the Principal Sudder Ameen, as the appeal of Ruhmut Bebee referred to only one portion of the property in question, in which the other defendants who have not appealed were not interested. It appears that Ruhmut Bebee made plaintiff and her co-defendant the respondents in her appeal, which was filed on 5th October, 1866. On 23rd February, 1867, the co-defendants filed a vakeelutnamah, but not having any contention with Ruhmut Bebee, took no further proceedings in the case; and when the appeal was heard, their vakeel was not present. On 11th March, 1867, plaintiff filed a cross-appeal under Section 348, Act VIII of 1859, objecting to so much of the judgment of the Lower Court as refused to give her possession of the other villages which she claimed, and which were in the possession of her co-respondents. It does not appear that they were aware of the existence of this cross-appeal. Certainly, no notice was served upon them to meet it, but the Principal Sudder Ameen, apparently looking only to the words of Section 348, and disregarding the precedents of the Court which have laid down the proper construction of that sentence, thought that the cross-appeal re-opened the whole case, and enabled him to try the merits as between all the parties. It has been repeatedly held by this Court that when a cross-appeal is made, it opens out the case only against the original appellant, and not against the co-respondents. The respondents making the cross-appeal can take objection to any part of the judgment of the first Court adverse to him to which the appellant can answer, and which affects the appellant's interests only; but the cross-appeal of a respondent does not open up any question between himself and his co-respondents, for they cannot be allowed to interplead. The law gives a respondent a right to raise

objections at the hearing of the appeal, as if he himself had preferred a separate appeal; but, though the words of the Section 348 are very wide, the reasonable construction to be put upon them is that the contest is between two parties, both equally interested in the matter of the appeal, and not with the third parties who, though originally made parties to the suit by the plaintiff, have no interest in the subject of the appeal brought by one of the co-defendants. Had plaintiff wished to re-open the case in the present instance against the other defendants, the Principal Sudder Ameen might have given her time to file an appeal on good cause being shown for its not being filed within proper time. We think, therefore, that the Principal Sudder Ameen has committed an error in re-opening the case as regards the special appellants, and we reverse so much of it as affects their interests with costs.

Special Appeal from Tirhoot.

CASE 1238 of 1867.

4th January.

Bhoojunga Thakoor, (Plaintiff) *Appellant, versus* Luchmee Narain Sahye, (Defendant) *Respondent.*

Before *Loch* and *Dwark Nauth Mitter*, J. J.

Baboo Shib Chunder Chatterjee for Appellant.
Mr. R. E. Twidale for Respondent.

Where the Revenue Court, instead of first proceeding in execution against the under-tenure on which arrears were due, sells other property, this is an irregularity, but not such a defect of jurisdiction as to warrant the Civil Court in setting aside the sale so made.

This was a suit instituted by the special appellant, for the purpose of setting aside a sale held in execution of a decree passed against him under Act X of 1859. The Lower Appellate Court has dismissed the suit, upon the ground that the Civil Courts were not competent to interfere with such a sale in conformity with a Full Bench Ruling of this Court, reported in page 147, Weekly Reporter, special number. In special appeal, the two following points have been urged before us:—

First.—That the sale in question having been held by the Deputy Collector contrary to the provisions of Section 105 of Act X of 1859, was null and void for want of jurisdiction, and that therefore the Civil Court was fully competent to set it aside.

Second.—That the Lower Appellate Court was wrong in dismissing the claim of the special appellant with reference to mouza Bostum which was not included in the sale.

With reference to the first point, it has been contended before us that the Deputy Collector had acted without jurisdiction in selling the property in dispute before proceeding against the under-tenure, for the rent of which the decree was passed, as provided for by Section 105 of the Act. We are however of opinion that the irregularity complained of does not amount to defect of jurisdiction. It is a mere irregularity in conducting the sale; and whatever might have been the force of the objection if we were competent to deal with the legality or otherwise of the sale, we do not think that it renders the proceedings of the Deputy Collector absolutely null and void for want of jurisdiction. The law expressly declares all proceedings held by the Revenue Courts in execution of their own decrees final and conclusive, and we are unable to interfere with such proceedings when no special ground, like that of fraud, has been pleaded before us.

With reference to the second objection, we are of opinion that the special appellant is entitled to a decree. What has been sold by the Deputy Collector is mouza Nyagong. The respondent pleaded that mouza Bostum is as dakhilee of mouza Nyagong, and as such passed to him under the sale.

It has been, however, conclusively shown, from the extracts of Collectorate records filed in the cause, that mouza Bostum is an aslee village by itself. The contention of the respondent, therefore, falls to the ground at once. The decree of the Lower Appellate Court will be modified to this extent, and the costs of the litigation will be proportionately divided between the parties.

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CASE 1055 OF 1867.

Special Appeal from Midnapore.

Shibnarain Bose, (one of the Defendants) *Appellant, versus* Ramneedhee Bose and others, (Plaintiffs) and others (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Baboo Hemchunder Banerjee for Appellant.
Baboo Bungsheedhur Sein for Respondents.

Commensality no proof of joint estate. A and B are uterine brothers; C and D are also uterine brothers, and half brothers to A and B. B dies while the family is joint in estate. The other three will succeed to B.'s share equally.

The points taken in special appeal are, *first*, that the Principal Sudder Ameen is wrong in his interpretation of the Hindoo law; and, *second*, that he has decided the plea in bar improperly.

We take the second point first. The Principal Sudder Ameen observes that the suit of the plaintiff is not barred, because the evidence shows that both parties held joint possession until they were separated in Choit, 1265.

A portion of the evidence upon which the Principal Sudder Ameen relied has been read to us; and it certainly does not warrant the conclusion at which he has arrived, *viz.*, that the family were joint in estate up to 1265, B. S. The Principal Sudder Ameen seems to think that, because the family were joint in mess up to 1265, they must also necessarily have been joint in estate up to the same period. The evidence of the surbarakar and the lowazima papers show that the collections were made and paid in distinct shares; and it is not necessary that there should be a partition by metes and bounds before a division can take place between members of a joint Hindoo family. The members of this family appear to have agreed amongst themselves that the property was to be the subject of ownership in certain defined shares, thus taking away the character of joint enjoyment in the estate. The Principal Sudder Ameen has therefore, in our opinion, failed to give the evidence its proper legal effect, being led away by the impression that, because the family remained joint in mess up to 1265, they were also joint in estate up to that year. The case must therefore go back for a proper finding upon the plea in bar, on a consideration of the evidence adduced as to the share in dispute being separately enjoyed by the defendants for more than twelve years prior to suit.

On the first point, we think that the Principal Sudder Ameen is not wrong. There were four brothers, *viz*, Kistopershad and Rampershad, uterines, and Loll mohun and Rammohun, half brothers of the two first named. Rampershad, one of the uterines, died without issue. At the time of his death, the three surviving brothers were undivided in estate, and they would therefore succeed equally to the share of Rampershad. (Weekly Reporter, Volume II, page 41; Dyabhaga, Chapter XI, Section V, paragraphs 35 and 36, page 211; Shama Churn's Vyavastha Durpana, page 187, Volume I.)

The case is remanded for trial on the issue in bar. Costs to follow the result.

CASE 441 OF 1866.

7th January.

Regular Appeal from Maunbhoom.

Moharajah Nilmonee Singh Deo, (Defendant) *Appellant, versus* Eshur Chunder Ghosal, (Plaintiff) *Respondent.*

Before *aByley* and *Phear*, J. J.

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Appellant.
Baboos Dwarka Nauth Mitter and *Kalleeprosono Dutt* for Respondent.

Plaintiff took a putnee lease from defendant, in which it was stipulated that he should be entitled to reduction of rent if any of the

Bayley, J.—The hearing of this case was deferred at the request of both parties to enable them to compromise it. This not having been done, we proceed to hear the appeal.

It is admitted that plaintiff in this case took a putnee lease from defendant.

Plaintiff, however, alleges that defendant "having fraudulently included

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in my putnee, bynamahs, mouzahs, and lands, whose very names, traces, and positions are not in existence, and rents which never were realized, and are not realizable in connection with the defendant's zemindary, I have been wronged by him. I therefore bring this action for remission of the rents which cannot be realizable from the aggregate jumma mentioned in the bynamahs of the talooks, and for getting the proportionate amount of the consideration money with interest and rent in proportion to the amount unrealized out of the rent paid for 1257 to 1270, with interest, refunded to me, laying the claim at Rupees 7,767-8-1, *viz.*—

		Rupees.
1.	Remission of rent	1,750
2.	Refund of consideration ...	1,170
3.	Interest	530
4.	Refund of rents	3,500
5.	Interest on ditto	816

assets of the lease were found to be wanting. He afterwards sued, alleging that defendant had fraudulently included in the lease non-existent items, and begged for remission of rent for the future, and refund of consideration money and excess rents paid. *Held*, that that part of his suit which asked for future abatement of rent would lie only in the Revenue Court; but that the rest being in the nature of a suit for specific damages for breach of contract, would lie in the Civil Court.

The plaintiff classifies his claim as—

1. Lands mentioned in his deed, of which no trace can be found.
2. Lands in his deed held by others as their property.
3. Lands in the deed recorded as part of original villages, but not to be found therein.
4. Lands, the rents of which have been decreed to others.

The plaintiff's further allegations, as in his written statement, are that he took the lease at the amount of lands and jumma stated in the deed "on reliance on the words and acts of the defendants;" that the lease required notice to be given within eight months of any deficiencies of area; and that not only was this notice given, but the defendant at first ordered enquiry, but afterwards refused all redress.

Defendant, on his part, pleaded that the Civil Court had no jurisdiction, as this was a suit for abatement; that plaintiff had not complied with the conditions of the lease, *viz*, that he was to give notice of any claim in respect to deficiency of area and assets within eight months of that lease; that plaintiff had in his possession all that was conveyed to him under the lease; that none of what was conveyed under the lease to plaintiff belonged to other parties; that the agreement was not to make up individual and separate deficiencies, but only such an amount as on a balance of deficiency and surplus might be found to be the net deficit; and that plaintiff did fully satisfy himself of the assets by enquiry for six or seven months.

The Lower Court held that, as the suit was not only for abatement, but also involved a plea of fraud on the part of the lessor, and of misrepresentation as to assets affecting substantially the real contract, the Civil Court had jurisdiction. The Lower Court also held that limitation did not bar the suit.

On the merits, the Lower Court found as a fact that plaintiff did inform the defendant of the deficiency of assets within eight months as stipulated in the lease, and that the evidence showed the defendant had intentionally concealed facts with a view to defraud plaintiff of rent and consideration, and that defendant did not give plaintiff full possession of all the lands and jumma stated in the potta, and that plaintiff was therefore entitled to a proportionate diminution of rent and refund of consideration and of rents paid in full

The decree of the Lower Court was for Rs. 5,586-15, *viz.*, remission of rent, Rs. 1,575-5-4; refund of "nuzarana," or consideration money, Rs. 1,152-9-17; refund of rent, Rs. 3,150; interest on amount to be refunded from date of payment to date of suit, Rs. 1,265-11-3.

The plaintiff appeals against this decision, urging, *first*, that the Civil Court had no jurisdiction, the claim being substantially one for abatement of rent.

Second.—That limitation barred the plaintiff's suit, the plaintiff having paid the full rent, without objection, for three years.

Third.—That the plaintiff did not comply with the terms of the

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kaboolent, inasmuch as he did not within eight months set forth any deficiency of area and assets, and that the letters of Amlah relied upon by plaintiff to show that plaintiff did so are not binding on defendant.

Fourth.—That there is no evidence to show that defendant acted in fraud, and that plaintiff ought to have had the burden upon him of proving the fraud, which, however, was not put on him by the Lower Court.

Fifth.—That the deficit of area and assets was not to be taken by specific parcels, but on the general net loss found over the whole area, and the assets of the putnee after deduction of all surplus.

Sixth.—That the decree should not have been based on the Ameen's Report, which is incorrect.

Seventh.—That interest was improperly allowed by the Lower Court.

I am of opinion that while the plaint shows a distinct prayer for abatement, it also sets forth, as the main ground of the suit, a fraudulent breach of contract by misrepresentation and refusal of deduction and refund stipulated for on a specification of assets and area not proving to be to the extent contemplated by the parties.

I further think that, with reference to Clause 3, Section 23, Act X of 1859, so much of the claim as refers to abatement is beyond the jurisdiction of the Civil Court, but that the rest of the suit, that is, the main part of it, is based on the loss arising from fraudulent conduct of defendant, and, therefore, is properly cognizable by the Civil Court, and that the appeal so far may, consequently, be tried by us.

It is indeed urged for the plaintiff that this is not strictly a case of abatement as contemplated by Act X of 1859, but rather a claim in which abatement is a necessary ingredient, because of the loss being the result of fraud in the inception of the contract. But that might be a ground to take the decree on the contract as evidence in a suit for abatement, but it could not give jurisdiction when there is none by law.

On the matter of limitation, *viz.*, that the suit cannot lie, as more than three years have elapsed, even since the expiry of the eight months, during which plaintiff was bound to give notice of any deficit of assets, this plea will not apply under the view I take of this case, *i. e.*, of its being one of fraud on the part of defendant, for fraud would remove the bar.

After a careful consideration of the terms of the kaboolent admitted by both parties, and of the other evidence in the case, I can come to no other conclusion than that the defendant induced plaintiff to take the lease on the understanding that all the assets referred to in the deed were forthcoming, and that, if they were not so, deductions and refunds should be made accordingly by defendant; but that, in fact, the latter fraudulently and intentionally did not keep to this covenant, and that plaintiff did give notice as stipulated.

It has been strongly pressed upon us that the plaintiff had the fullest notice of the possibility of mistake in such a jungle mehal property as this, and that it was with the object that the plaintiff should not thereafter have to complain that the unusual stipulation was made in the deed; that plaintiff was to enquire and give notice within eight months of any deficiency; that, consequently, the principle of *caveat emptor* most fully applied. But I am of opinion that the basis of the contract, as understood by the parties, was that the defendant undertook, upon notice of deficit in specific assets supposed by the parties to be available to the plaintiff, to make enquiries as to the specific items, and, according to the result, to make up the lessee's specific loss on each item by a deduction of rent and refund of consideration. The preceding general conditions of no excuse being admitted for loss of assets by drought or inundation, and the like, are quite modified by the specific, or, as it is called, "only" condition, which is that above mentioned. This remark, I think, further meets and answers the plea that it was only on the general balance, if taken on both sides of a profit and loss account, that this condition was to have effect. In fact, the kaboolent, read as a whole, is that defendant (Rajah of Pachete) covenanted to make up the entire amount of land set forth in the kaboolent

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to defendant, or, if not available, to the lessee, whether it was from not being found within the defendant's property, or in possession of others, or gone from defendant's possession under decrees, or not part of the original villages mentioned, or in other villages not in the lease, or described as open to enhancement when not so (*i. e.*, ekdufa).

As to the plaintiff's having the burden on him, and not having discharged that burden, it is of course for plaintiff, who makes the allegation of fraud, to prove it. But looking at all the evidence before us, I think plaintiff has sufficiently proved his case, so as to require defendant to rebut it, and that the defendant has entirely failed to do this. The Ameen's report is in favor of plaintiff, and defendant in no way shows it to be one not to be relied on. There is the usual objection in one and all such cases that the report is an improper one; but no one specific item of fraud, error, or act of partiality, or wrong by the Ameen, is demonstrated to us on proper evidence; it thus only remains for me to add that I think, on the evidence relied on by the Lower Court, plaintiff has fully shown that he gave the notice which he covenanted to give to defendant.

Such being my view of this case, I would dismiss the appeal with all costs, except as to abatement, as to which the Civil Court had no jurisdiction.

Phear, J.—I agree generally with Mr. Justice Bayley. In substance, the plaintiff sues for damages for breach of contract, and further seeks to have the contract altered in regard to the amount of rent to be paid under it for the future. The latter part of the plaintiff's application is such as cannot generally be entertained in the Civil Court. All that a Civil Court can do in this respect is to reform a contract in such a way as to make its terms accord with the original intentions of the contracting parties. It does not appear that in the present case any suggestion is made that the parties were not originally of accord in respect to the amount of rent contracted to be paid. The plaintiff only complains that he was induced to agree to that amount by the fraudulent representations of the defendant. This may entitle him to avoid the contract altogether; but if he chooses to abide by it, he is not entitled, on this ground, to have its terms altered by the Civil Court. His remedy, if any on this head has not been rendered unnecessary by the damages awarded by the Civil Court, must be sought in a suit for abatement of rent in the Collector's Court. I therefore think the Lower Court was wrong in decreeing future abatement of rent.

In other respects, I think the judgment is clearly right. The defendant has certainly failed to fulfil his contract with the plaintiff; and it appears to me that the several items of the amount which the Lower Court has decreed to the plaintiff are directly traceable as damages to the defendant's breach.

I would reverse the decision of the Court below so far as it decrees abatement, and affirm it with costs in other respects.

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CASE 1082 OF 1867.

Special Appeal from Dacca.

Mohesh Chunder Sircar and another, (Defendants) *Appellants, versus* Bholanath Raha Gomashta and others, (Plaintiffs) *Respondents.*

Before *Kemp* and *Glover*, J. J.

Baboo Motee Lall Mookerjee for Appellants.
Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Where lands held under one jumma lie in two or more jurisdictions, it is not competent to plaintiff to bring a suit for enhancing the rent of that part of the land only lying in one jurisdiction. He must sue in the jurisdiction in which the greater part of the lands lie, to enhance the undivided jumma.

It appears to us that this suit will not lie in its present form. The plaintiff sued defendant for enhanced rent on lands situate in three different mouzahs, belonging to the two districts of Jessore and Furreedpore. The jumma for all was one lump sum, with no specification of what was due on each separate parcel of land. Before the case came on before the Deputy Collector of Furreedpore, however, he abandoned his claims to the enhanced rents of the lands in Jessore, and sued only for that due on the Furreedpore lands. The Deputy Collector held that such a suit was irregular.

We think that the Deputy Collector was right. Section 20, Act VI of 1862, Bengal Council, lays it down distinctly that when lands held in one tenure and at one rent, which is precisely the present case, are situate within different jurisdictions, the first question to be decided is, in which district or sub-district the greater portion of the lands lie, and no suit can be entertained until that point be settled, and the case brought in the Court of the district in which such greater part is situate.

The law appears to us perfectly clear on the point; and before the plaintiff can sue the defendant for enhancement, he must first have it decided by the Collector whether the major portion of the lands, the rent of which he claims, is situate in Furreedpore or in Jessore, and proceed with his suit accordingly.

The appeal is therefore allowed, and the Judge's order reversed with costs on the special respondent.

CASE 1195 OF 1867.

20th December.

Special Appeal from 24-Pergunnahs.

Doorga Churn Sircar, (Plaintiff) *Appellant, versus* Radha Mohun Nauth and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Baboo Kalee Mohun Doss for Appellant.
Baboo Anund Chunder Ghosal for Respondents.

The Lower Court acted wrongly in dismissing plaintiff's suit for enhancement, and for assessment of excess area, on the ground that defendant occupied the land under different titles and in various holdings, when such objection was not taken by defendant himself, and need not have barred the trial of the suit in any case.

Seton-Karr, J.—I am of opinion that the judgments of both the Lower Courts are wrong in dismissing the plaintiff's suit, and in referring him to two separate suits.

The plaintiff sued to assess rent on 103 beegahs and 14 cottahs of land, and on some 46 beegahs, which he said the defendants held in excess of the said holding.

The defendants replied that they held no lands in excess, and that the 103 beegahs had been held by them and others since the time of the permanent settlement at a fixed rate.

The first Court dismissed the suit, saying that, "on reference to the papers filed, it appears that the defendants held the lands under different holdings, which, when united, made them tenants of 103 beegahs," and that for this amount, and for another amount of 7 beegahs held in the name of a third person, two suits, and not one, ought to have been instituted.

The Judge endorsed this finding, and added another reason for dismissing the suit, which was that the plaintiff held by various titles, namely, talook, putnee talook, and lease.

I am of opinion that on the issues raised by the plaintiff, and by the defendant's statements, the suit ought to have been allowed to go to trial by the first Court.

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The defendant stated nothing as to various holdings by way of barring the suit, nor did they take the least exception to any variations in the plaintiff's title. The statement about the various holdings seems to have been gathered from some ikrar or other paper on the record by the Court itself. As the matter was presented to the Court, and on the defendant's own showing, I think there is nothing whatever to prevent the case from going to trial on the merits.

The case will be returned to the first Court for that purpose. Even if it should turn out that the 103 beegahs were made up of various holdings, situated in different holdings, or not liable to be similarly treated, *quoad* any increase of rents, all that would be necessary to do would be to consider the state and condition of each holding in assessing the rents.

But this, as already observed, does not appear to have been the plea on which the defendants resisted the action. They pleaded no excess of land, and payment of a fixed rate of rent.

Where the statement about the 7 beegahs held in the name of a third party came from has not been shown to us on appeal.

But all that I think that is necessary in this case for the Court to try is, *first*, whether the defendants are entitled to hold 103 beegahs at a fixed rate, or whether they are liable to enhancement for the same; and, *secondly*, whether they hold some 46 beegahs in excess of, but as appertaining to, those 103 beegahs.

The case should go back to the first Court for trial on these points.

Macpherson, J.—I agree in thinking that the case ought to be remanded for trial on the two points indicated.

CASE 1471 OF 1867.

3rd January.

Special Appeal from East Burdwan.

Judoonath Paul, (Plaintiff) *Appellant, versus* Prosonno Nath Dutt and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. R. V. Doyne and *Baboos Onoocool Chunder Mookerjee* and *Hem Chunder Banerjee* for Appellant.

Baboos Kishen Kishore Ghose, Ashootosh Chatterjee, and *Grijasunker Muzoomdar* for Respondents.

Where it is found as a fact that defendants are the beneficiary lessees in possession, and no special contract is shown to exist that the ostensible holders should alone be liable for rent, a decree for arrears may be given against the former alone.

Seton-Karr, J.—This was a suit for rent against a certain durputneedar; and it had been remanded by order of the former Judge for the plaintiffs to elect whether they would proceed against the ostensible holdor of the tenure who was one Purbuttia, and afterwards his wife Sonamonee, or whether they would proceed against the Dutts, who were the parties whom plaintiff alleged to hold the real and beneficial interest.

The plaintiff having elected to proceed against the real, and not the ostensible, holders, the Deputy Collector went into the case, and found as a fact that the Dutts were actually in possession, and that they were, consequently, liable to pay the rents in full.

When the case came up in appeal before the Judge, several objections were taken to the finding of the Lower Court. some of which, regarding the plaintiff's title, were clearly irrelevant, while others were certainly not pressed at the hearing of the appeal.

Ultimately, the case was heard, in appeal, on the following question, namely:—

"Whether a Collector, under Act X, can decree arrears of rents against parties, only on the ground of their possession, when no previous realization of rent from them is established, and no written agreement is shown to have been executed, while, at the same time, another party is the ostensible holder of the lease, and does not deny liability for the rents of the mehal."

The distinct finding of the Deputy Collector that the Dutts had the beneficial interest, and were the parties in possession, appears never to have been questioned; and certainly it is not reversed by the Judge in appeal. In this

state of things, I think that there is nothing whatever to debar the plaintiffs, who have elected to proceed against the real holders, from proving their possession, and from, consequently, gaining a decree.

The Judge relies upon a case quoted at page 449, Hay's Reports, 11th November, 1862, Heera Loll Bukshee, defendant, appellant. But this case, which relates to the liability of agent and principal, does not appear to be analogous to the case before us.

The Judge nowhere finds, on the evidence, that in past years credit for the rents was given either to Parbuttia or to Sonamonee, the ostensible holders; but without coming to such a finding in clear and distinct terms, it was not competent for him to reverse the decision of the first Court in plaintiff's favor, more specially when he does not question, but rather takes as correct, the finding of that first Court as to the actual possession and enjoyment of the Dutts against whom the decree was given.

In this state of things, it appears to me that the reasoning of the Judge on the facts found, and not impugned, is erroneous in law, and that there is no reason why the plaintiffs should not retain their decree against the parties whom they had elected to sue, and whom they have shown to be in possession; and in this view the decision of the Judge should be set aside, and that of the first Court in plaintiff's favor should be restored with costs and interest.

Macpherson, J.—I think the Judge was wrong in reversing the decision of the Deputy Collector, unless he first found, as a matter of fact, that credit was originally given, not to the real lessees, but exclusively to the person in whose name the lease was granted. The Judge accepts the finding of the Deputy Collector that the respondents were the real lessees in possession; and if so, the relation of landlord and tenant existed between the plaintiff and them, and they were liable for the rents, unless there was a special contract to the contrary, that is to say, unless there was a special contract that the person whose name was used should alone be liable.

This decision agrees generally with the principles laid down in the Full Bench Ruling, reported at page 2, Volume V of Wyman's Reporter (Rent Suits).

The decree of the Lower Court must be reversed with all costs.

Regular Appeal from Mymensingh.

CASE 213 OF 1867

3rd January.

Golam Ali, (one of the Defendants) *Appellant, versus* Baboo Gopaul Lall Thakoor, (Plaintiff) and others (Defendants) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Mr. R V Doyne and *Baboos Onoocool Chunder Mookerjee, Romesh Chunder Mitter*, and *Anund Chunder Ghosal* for Appellant.

Mr. Cowie and *Baboo Kallee Mohun Dass* for Respondents.

Construction of terms of lease by those of kabooleut in absence of original lease. Where defendant was granted a lease of jungle land to be held for a year rent-free, and thereafter at a jumma progressive up to a certain maximum, plaintiff could not sue to enhance the rent to neighbouring rates in the first year of the full jumma. The terms of the

Phear, J.—The plaintiff, a large landed proprietor, residing in Calcutta, seeks, in this suit, to recover from defendants, as his tenants, rent at an enhanced rate after notice, alleging that "on the strength of a Nakaemee Amulnamah executed on the 4th Bhadro, 1260, by his Naib in favor of defendants Golam Ali and Poonye Akbar, the father of defendant Zakoot Ali, in respect of four droons three kanees four gundas of land within specified boundaries in the district of Backergunge, the two defendants hold possession of the lands comprised within the said boundaries, and a large quantity of land beyond the same" The grounds of enhancement set forth in the plaint are "that the defendants hold possession of more lands, and that, without their agency and expense, the value of the produce of the said lands, and the productive power thereof, have increased."

The defendants, in their written statement, entirely deny that they are liable on any ground to pay an enhanced rent for any portion of the lands in question; and they further say as follows:—

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documents in the present case prevented, in fact, his so suing at all

Question of assessment of excess area reclaimed by defendants beyond the specified boundaries of their pottah.

"The plaintiff has brought this suit on the allegation that the amulnamah pottah was granted by the Naib; but this is false. In fact, we own and hold the disputed land under a howladaree document signed by the plaintiff himself."

In support of the plaintiff's case, a kaboolent, dated 4th Bhadro, 1260, was put in, which the defendants admit to have been the document given by their predecessors in title. The plaintiff has brought forward a considerable amount of parol evidence to prove that the corresponding pottah was signed by the Naib, and not by himself. On the other hand, the defendants have produced a document purporting to bear the actual signature of the plaintiff; and this they say was the pottah executed by the plaintiff himself, and delivered in exchange for their kaboolent. In this state of the contest between the parties, naturally enough the issue whether or not this last-mentioned document is a forgery has been more regarded, and more warmly fought over, than is commensurate with its relevancy to the merits of the suit itself. The Lower Court arrived at the conclusion that the alleged pottah is a forgery; and it directed that a criminal charge should accordingly be preferred against the two defendants. We have been informed that such a charge was duly made, and that the defendants are now awaiting their trial for forgery before the Criminal Court. However, it seems to me that it is quite unnecessary for us, in the trial of this civil suit, to enter upon the matter of the alleged forgery at all. Whether the pottah put forward by the defendants is a fabricated document or not, in the view which I take of this case, is a question that does not bear upon the relative rights of the parties with respect to the enhancement, or lead to evidence of what these rights are; and it is extremely satisfactory to me to feel that I shall therefore be able to determine the matter in suit between the plaintiffs and defendants, without saying a word which might be used elsewhere to affect the result in the criminal proceedings.

The plaintiff brings the kaboolent from his own sherishta, and admits that it was delivered to him or his agents in exchange for a pottah at the time when the contract relative to the tenancy of the land was made, namely, 4th Bhadro, 1260; and there is no question raised by the defendants as to its authenticity. Nor does the plaintiff deny that, having accepted this kaboolent, and having kept it all the while in his own custody, he has allowed the defendants to retain possession of the land for thirteen years under the arrangement, whatever it was, that was effected between him and their predecessors on the 4th Bhadro, 1260. Clearly, then, the plaintiffs cannot resist the claim of the defendant that this document should be taken as conclusive evidence of the terms of that arrangement under which they hold, unless he can show that, to the knowlege of the other party, either it is, in itself, an erroneous representation of that contract, or, being correct as far as it goes, is incomplete, and will not give the full terms, except it be supplemented from some other source. The plaintiff takes the latter alternative, and, as I understand him in effect, says that the real pottah delivered by him contained such a form of signature, namely, signature by the hand of an agent, and was wanting in some few words of such significance, that if it were considered side by side with the kaboolent, the contract of tenancy exhibited by the two would differ in material respects from that which is apparent on the words of the kaboolent alone. It is, I think, *á priori*, improbable that a kaboolent should not be a counterpart of the pottah, and still more improbable that the parties to any contract should intend a different obligation to be imposed by the act of signing a written document per procuration from that which would flow from the words of the same document if signed autographically. Therefore, it seems to me that the plaintiff requires more than ordinarily strong evidence to support his position in either of its aspects. He must show, on the one hand, beyond all reasonable doubt, what were the actual terms of the pottah which, he says, was given by his agent on his behalf; and in particular, he must point out the differences

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between it and the kabooleut. This might be done by the production of the draft of the pottah, or by the oral testimony of those persons who were concerned in drawing it up On the other hand, he must make it clear that the original parties to the transaction understood, and intended, the vicarious execution to afford a special rule for the construction of the document. In my opinion, the plaintiff has left his burden of proof, as thus described, wholly untouched. We have had no doubt a great body of evidence presented to us relative to the practice of the plaintiff in regard to signing the contracts between himself and his tenants. He is accustomed, it appears from this, to draw a line between the cases of permanent tenures and those of holdings, which are temporary in their nature. In the one case, he executes with his own hand; in the other, with the hand of his Naib. This may well be; but there is nothing, from the beginning to the end of this evidence, to show otherwise than that the distinction as to the tenancy lies in the body of the writing, and is not introduced by the form of the signature. Then, again, the plaintiff has not even made an attempt to show what the words of his pottah actually were. Under these circumstances, I am of opinion that we must treat the kabooleut produced by the plaintiff as being complete and conclusive evidence between the parties to this suit, as regards the nature and the terms of the tenancy under which the defendants hold the land of the plaintiff.

This kabooleut, immaterial parts omitted, runs thus:—

"To the high in dignity Gopaul Lall Thakoor," &c.

"I, Golam Ali, and I, Poonaye Akhan, do execute this kabooleut puttro to the following purpose:—That we made a petition praying to obtain a howladaree amulnamah in respect of four droons three kanees four gundas of land, jungle puteet land, which, after deduction of four gundas per kanee of the tulhee land on account of howladara rukba, are to be assessed at five Rupees per kanee, being rent-free in the current year 1260, at one Rupee per kanee in the year 1261, two Rupees per kanee in 1262, three Rupees in 1263, and at the full customary rate in 1264, and which are situate," &c. (Here followed specified boundaries.) "That according to the said petition of ours, you do hereby grant a howladaree amulnamah. That out of the said amount of four droons three kanees four gundas of land situate within the aforesaid boundaries, four gundas per kanee, or eleven kanee four gundas in all, being deducted on account of rukba, there remains an amount of three droons eight kanees of land which we shall cultivate and improve, and hold rent-free in 1260, and pay rent at the rate of Rupee one per kanee, or Rupees 56 in 1261, at the rate of Rupees two or Rupees 112 in 1262, at the rate of Rupees three or Rupees 168 in 1263, and at the full customary rate of Rupees five or Rupees 280 in 1264, year by year and month by month as per instalments mentioned below. That we shall not urge any plea or objection in regard to inundation, drought, death, absconding of ryots, sandyland, laik, or gair-laik, and abadee, or gair-abadee; and if we do so, it will not be admissible. That if any instalment fall in arrears, we shall pay the same with interest at the rate of Rupee one per cent. per month; and on our failure to do so, the amount will be recovered with interest according to the laws in force. That after the month of Pous, 1261, a measurement will be held with reference to the boundaries, and notice will be served on us from your sirkar to execute a kabooleut within fifty days, with specification of jumma and land according to the said measurement. That if we do not appear before the Ameen holding measurement, and do not cause the land to be measured, and the rent to be ascertained, the measurement will be effected in our absence, and the amount of abadee and laik abadee land thus found will be considered as part and parcel of this howlah, as if admitted and consented to by us; and deducting therefrom the amount of the land mentioned above, the remaining excess land, *minus* rukba and the hassil land, will be assessed at the aforesaid rate from the year 1261, and the amount thus assessed will be paid by us, being added to the jumma already fixed. The laik abadee lands will be held rent-free for two years, and we shall execute a kabooleut and receive a pottah according to the practice of your sherishta for the land and jumma of the

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entire lands measured according to the said rate and rushud That we shall continue to pay rent according to the terms of the instalment bond given in the kabooleut, and we shall not be able to urge any plea or objection with regard to the same; and if we do so, it will not be admissible. We execute this kabooleut to the above effect after receiving the howladaree amulnamah. Finis. Dated 4th Bhadro, 1260." The document terminates with a schedule of the year's instalments, and the signatures of the witnesses.

I confess that during the hearing of the case, I have entertained considerable doubts as to the proper construction to be put upon the words of this kabooleut. On the whole, however, I am now of opinion that they must be taken to indicate a grant by the plaintiff to the defendants, or rather to their predecessors, in title of a permanent tenure at a fixed rate of rent. I am led to this in a great degree by consideration of the fact that the parties to the contract have carefully provided for a variation of the rent up to a maximum of Rupees five per kanee, and have yet been entirely silent as to any possibility of variation beyond that amount; and also that they have minutely prescribed the mode in which the excess lands within the given boundaries are to be assessed at rates rising up to the same amount—Rupees five—but, at the same time, have made no allusion to any other ground for the enhancement of the jumma to be paid for the lands leased. It seems to me, too, that the circumstances under which the parties were contracting are favourable to the supposition that an interest, such as might become beneficial to the lessee, was intended to be passed, rather than merely a right of occupation, which might, after 1864, at the option of the landlord, be screwed down by process of law to a simple rack rent tenure. The incoming tenant was certainly embarking upon an adventure in which all the labour and expense would be his, while, come what would, the landlord was assured of a considerable profit as long as the contract should endure. I am also strengthened in my conclusion by knowing that Morgan and Shumboo Nath Pundit, J. J., arrived at a similar decision in a case* not reported, which appears to run very nearly parallel with the present, namely, Chekundee Nicaree *versus* Annund Chunder Mitter, dated 6th September, 1855.

According to the view which I have just expressed, the defendants are not liable to be called upon to pay a rent greater than Rupees five per kanee, with the prescribed rukha, for so much of the plaintiff's land occupied by them as is within the boundaries specified in the kabooleut, and is therefore held subject to the terms alone which are therein mentioned, and no others. I also think, for the like reason, that their jumma of Rupees 280 cannot be increased by the addition of an amount for rent of such lands as they may hold in excess of the four droons three kanees four gundas within those boundaries, except by proceeding in the manner expressly laid down for that purpose in the kabooleut; and this suit is certainly not a step in accordance therewith.

CASE 571 OF 1865.

6th September, 1865.

Special Appeal from Jessore.

Chikundee Nikaree, (Plaintiff) *Appellant, versus* Anund Chunder Mitter and others, (Defendants) *Respondents.*

Before *Morgan* and *Shumboo Nauth Pundit*, J. J.

Baboo Sreenath Dass for Appellant.

Baboos Dwarka Nauth Mitter and *Aushootosh Dhur* for Respondents.

Construction of terms of a pottah for jungle land to be assessed after reclamation.

The allusion in the pottah, dated 7th Joisto, 1257, to the special appellant's liability to pay the rents that may, after general survey, be fixed for the lands held by him, refers to the amount of rent that for the quantity found in his possession according to the highest rate mentioned in the pottah he may have to pay. To construe otherwise would be unfair to the tenant, who has to pay for all works of damming, draining, and clearing, &c., necessary to bring the lands into a state fit for cultivation.

It cannot easily be believed that for new formed chur lands, not yet properly made fit for cultivation, requiring great deal of labour and expense to make them worth holding by an agriculturist on condition of paying lower rate only for five or six years, and that too progressive in each year, a pottah would be taken, that is, on terms according to which the landlord will have a legal right to demand an enhancement at any time after that short interval.

We accordingly decree the appeal with costs, and, reversing the decisions of both the Lower Courts with costs, decree the claim of the special appellant.

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As far, therefore, as concerns the land lying within the mentioned boundaries, I am of opinion that this appeal should be decreed, and the plaintiff's suit be dismissed with costs in both Courts.

As regards the land of the plaintiff which the defendants hold outside the boundaries given in the kabooleut, I think the plaintiff is entitled to receive rent for it at a fair and equitable rate, but the evidence before the Court does not enable me to determine what rate would be fair and equitable. There is nothing to show whether that portion of land was, at the time when its culture was first commenced, equal to in quality or condition, or better or worse, than the land for which the lessors in 1260 agreed to give a gradual rent rising to five Rupees And even if this starting point had been given us, we have no means afforded to us of discriminating between that portion of the present increased annual production of the land which is due to the efforts of the lessees, and that which is attributable to the improvement, by other means, of the productive power of the land itself; and I think it would not be equitable to oblige the defendants to pay a rent calculated on the present annual market value of the land without any deduction whatever in consideration of the expenditure effected by them in bringing about the state of productiveness which the originally jungle or waste land now exhibits. It lay upon the plaintiff to make out distinctly and separately the different elements upon which he has rested his right to enhance, namely, excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce. It is not enough for him to show that there has been a general increase in some one or all of these respects since a given period (in this case since the land was waste, and bore nothing but hogul grass); he must, with reasonable definiteness, establish the amount of each of those which he relies upon. If, for instance, he does not choose to, or cannot separate, the increment of productiveness which is due to his tenants' agency in a case where that agency is admittedly most markedly operative, and must be taken account of from that which proceeds from other causes, it is certain that the Court cannot do so for him. It seems to me that the plaintiff has failed to support with proper evidence that part of his case upon which alone he is, as I conceive, legally entitled to seek for enhancement of rent, and therefore that, even as regards this, his suit ought to be dismissed.

Under all the before mentioned circumstances, it results that, in my judgment, this appeal ought to be decreed in its entirety, and the plaintiff's suit dismissed with all costs.

Bayley, J.—This is a suit to assess at enhanced rents a tenure which is admittedly held under a howladaree amulnamah kabooleut propounded by plaintiff as given by defendants, and not denied by defendant to have been so given.

This kabooleut states that after one year rent-free (1260), the rent is to be one Rupee a kanee in 1261, two Rupees a kanee in 1262, three Rupees a kanee in 1263, and the *poor dustoor* (full customary) rate of Rupees five per kanee in 1264.

The land is termed jungle puteet. Excess found with reference to the boundaries after measurement is to be assessed. An extra allowance of area (as is usual in howlah tenures) to about one-sixth is given in, *i. e.*, one kanee four gundas is to be held, while one kanee is to bear the agreed rent.

It is impossible, I think, to read this kabooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of partly rent-free and partly progressive jumma allowed in those cases (and not in the case of cultivated lands); and that the full customary rent of five Rupees per kanee from 1264 was thereafter to be paid. I cannot think it reasonable, or borneout by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expenses and trouble of reclamation, and having done so, was, in the first year after full rent could be paid, *viz.*, after 1264, liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rate of neighbouring cultivated lands as to which no jungle waste had to be cleared.

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Then as to the excess area. I think it was clear that, supposing after reclamation more land of the lessor's was found held by the lessee than given by the specifications of the lease as to boundaries, excess should, as part of the same lease, be liable to the same terms as the other land originally given under it.

In respect to the question whether the disputed pottah is a forgery or not, I do not think it is necessary to determine the point, while the admitted kabooleut on which the plaintiff sues is before us, containing the admitted agreement of the parties. I would dismiss plaintiff's case.

CASE 1497 OF 1867.

4th January.

Special Appeal from Tirhoot.

Raushun Sing, (Defendant) *Appellant, versus* Lalla Ramanoograha Lall, (Plaintiff) *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Debendro Narain Bose for Appellant.
None for Respondent.

Failure in a suit under the Rent law to traverse the statements of the plaintiff, cannot be construed into admission of those statements. The prevailing rate of rent in a neighbourhood is the rent paid by the majority of the ryots there resident. Mode of ascertaining this. Local investigations by Ameens how to be controlled.

Mitter, J.—This was a suit instituted by the special respondent for arrears of rent at enhanced rates. The only ground of enhancement mentioned in the notice was that "the rate of rent paid by the special appellant was below the prevailing rate payable by the same class of ryots for land of a similar description, and with similar advantages in the places adjacent" The Court of first instance, finding that this ground of enhancement had not been made out by the respondent, gave him a modified decree at the old rate. On appeal, the judgment of that Court has been reversed, and the claim of the respondent decreed in full. In special appeal, it is urged before us that the decision of the Lower Appellate Court is erroneous in law, inasmuch as it is chiefly based upon the report of the Ameen (Dwarka Nauth), which report was not legally admissible as evidence in the cause.

I am of opinion that this contention is sound. The Ameen, instead of reporting upon the rate prevailing in the neighbourhood, merely stated that the land held by the special appellant ought, in his opinion, to be assessed at the rate claimed by the respondent. Such a report is, in my opinion, utterly valueless as evidence. The pleader for the respondent, instead of denying the correctness of the above proposition, rested his case upon the ground that the Lower Appellate Court has come to an independent conclusion upon the evidence of the witnesses examined by the Ameen. I do not think that this contention is well founded. The whole context of the Judge's decision clearly shows that he was mainly influenced by the report of the Ameen in coming to the conclusion arrived at. But conceding this point to the respondent, I am still of opinion that the case has not been properly decided by the Lower Appellate Court. The judgment of that Court, when analyzed into its component parts, reduces itself into the two following propositions:—

First.—"Plaintiff, in his notice, alleges that this land is of the kind styled *Bhitawal.* Defendant, in his answer, does not deny this. Hence the land in the possession of the defendant must be considered as *bhitawal.*"

Second.—"The Ameen states that he examined certain ryots of the neighbourhood, and of the same mouzah with defendant; and it is not denied that these ryots are of that nature, or that their lands are of the kind described by them." Hence the rate paid by these ryots is the prevailing rate payable by the ryots of the same class with the defendant for land of a similar description, and with similar advantages in the places adjacent.

Both of these propositions are, in my opinion, erroneous in law. For the purpose of determining whether the respondent had made out the ground of enhancement relied upon by him, three important points ought to have been kept in view: *first*, namely, the character of the land with reference to its fertility and advantages of situation; *second*, the class to which the special

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appellant belonged as a ryot; and, *third*, the prevailing rate payable by similar ryots for land of a similar character in the places adjacent. The first of the two propositions above mentioned refers to the character of the land, but the reasoning upon which it is based appears to me altogether fallacious. The defendant, special appellant, was not bound to traverse the allegation made by the respondent in the notice of enhancement, to the effect that the land in question was of the description called *bhitawal*. The doctrine of admission by non-traverse is not, in my opinion, applicable to written statements filed under Act X of 1859. The law, Section 59 of the Act, requires that the points of law and fact upon which the parties are at issue must be ascertained by examining them or their agents Whether the land held by the special appellant was of the description called bhitawal, or not, ought to have been found out by examining him on that point. This was not done; and, in the absence of any distinct statement by the special appellant one way or the other, the respondent should have been called upon to prove his allegation by evidence. It is clear, therefore, that the Court below was wrong in assuming that the land held by the special appellant was *bhitawal* land. As to the class of ryots to which the special appellant belongs, and the rate prevailing in the neighbourhood, the Judge's reasoning, which is contained in the second proposition above referred to, is still more untenable. It is admitted that the special appellant is a ryot having a right of occupancy. The evidence of the witnesses examined by the Ameen, and referred to by the Judge, does not show that those witnesses are ryots of the same class; or, in other words, that they are also ryots having rights of occupancy. The Judge says that they are stated by the Ameen to be "ryots of the neighbourhood, and of the same mouzah with the defendants, and that it is not denied by the special appellant that they are "of that nature." Now it is clear that, under the law, it was a question of the utmost importance to determine the rate payable by ryots of the same class to the special appellant. Act X of 1859 divides the ryots into two great classes, namely, ryots having a right of occupancy, and ryots not having a right of occupancy, and it is to this division that the words "same class" used in Section 17 evidently refers. "Any number of ryots coming forward to depose that they are of the same neighbourhood and of the same village with the defendant," without stating that they are occupant ryots, would not make the rate of rent paid by them the "rate payable by the same class of ryots" with the defendant. Non-occupant ryots have no right to hold their lands, except on such terms as their landlords might choose to let them; and for anything known to the contrary, the ryots examined by the Ameen might be non-occupant ryots; so that the rate of rent paid by them cannot be in any way assumed as the proper standard of adjustment in this case. Nor do I think that the Judge has found the "prevailing rate" in the neighbourhood in the manner required by the law. The witnesses referred to by him do not say that their lands are held by them at the uniform rate of three Rupees per beegah, the rate decreed by the Lower Appellate Court According to their testimony, the lands held by them appear to have been held at various rates; and it has been a matter of very great difficulty with me to make out how the Judge could come to the conclusion that three Rupees per beegah was the prevailing rate. But granting even that these witnesses had deposed that the lands held by them were *bhitawal* lands, and that the rate paid by them was one uniform rate of three Rupees per beegah, I am still of opinion that this evidence is not legally sufficient to prove the prevailing rate. The word "prevailing" used in Section 17 must have some definite meaning attached to it. It means the rate generally prevalent, or the rate paid by the majority of the ryots in the neighbourhood. Now the evidence of two ryots, (for that is the number referred to in the present case) simply showing that they paid their rents at the rate of five Rupees per beegah, does not go to prove the prevailing rate, or the rate paid by the majority of the ryots. I do not mean to say that all the ryots in the neighbourhood are to be examined, and then the rate paid by the majority of them is to

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be found out. But I do mean to say that the evidence given must purport to show the rate paid by the majority; otherwise it cannot be said that the prevailing rate has been established. In the case before me the Ameen had examined thirty other ryots, who deposed that the rate of rent prevailing was one Rupee per beegah, or, in other words, the same as the rate at which the special appellant has been hitherto paying his rent. The Ameen gets rid of this evidence by the remark that these ryots too have been served with similar notices of enhancement with the special appellant. The Judge has not alluded to the evidence of these thirty witnesses at all; and this, I think, is a sufficient ground, in itself, for holding that his decision is defective in law. But be that as it may, it appears, from the decision of the Judge, that he too was of the same opinion with the Ameen that the evidence of those ryots in the neighbourhood who have been served with notices of enhancement by the respondent ought not to be taken into consideration. The Judge says:—"It is urged that the Ameen did not examine the ryots holding the lands which are directly adjoining those of the defendant. This may be true; but it is certain that notices have been served upon these latter ryots." This one passage clearly shows that the Judge had no clear and definite idea of the point he was called upon to decide. Against the evidence of twenty ryots deposing that they paid their rent at a particular rate, there was the evidence of thirty ryots who deposed to a different rate already examined by the Ameen, besides that of others whom he did not examine. I cannot understand how the facts of these ryots, having been subsequently served by the respondent with similar notices of enhancement, can affect their eligibility as witnesses in the cause. Suppose that a village consisted of 100 ryots, all belonging to the same class, and all holding lands of a similar description, and with similar advantages of situation; suppose also that ninety-one of these ryots paid at the rate of one Rupee per beegah, and the remaining nine at the rate of three Rupees per beegah, what is the prevailing rate in question? Surely one Rupee per beegah. Suppose, then, that the proprietor of the village being desirous of enhancing the rents of the ninety-one ryots above referred to, serves them with notices of enhancement, and institutes his suit against any one of them as a first experiment, the only ground of enhancement assigned being that the rate paid by him is below the prevailing rate, can it be said that the evidence of the ninety witnesses is to go for nothing, and that the prevailing rate must be found to be three Rupees per beegah upon the evidence of the nine remaining ryots who pay at that rate? Such a proposition would be absurd upon the face of it, and it would end in nothing else but in allowing the landlord to make out the prevailing rate in any manner he things proper. This is what appears to me to have precisely happened in the present case. The respondent did not want to go into Court upon any of the other grounds mentioned in Section 17. He wanted to proceed upon the ground of the prevailing rate solely and exclusively; and it being entirely within his own power and discretion to serve his own ryots with notices of enhancement, he resorted to that expedient as the safest course by which he could make out that the rate paid by the minority was, in fact, the prevailing rate current in the neighbourhood. I think, therefore, that this case has not been properly investigated at all. The law has been overlooked in all its essential parts, and the decision arrived is manifestly illegal and unjust.

I wish also to remark that a practice has been fast growing by which Ameens are made the real Judges of important questions of law and fact, which it is the duty of the Court itself to determine. Local investigations ought to be restricted to points which really require some local inspection for their elucidation. It is absurd to suppose that the Legislature intended that in every case for enhancement an Ameen ought to be deputed to enquire into, and report upon, the rates at which the enhancement is to be made; and the mischievous consequences of acting upon such a supposition are painfully manifest in the present case. It appears that another Ameen was deputed before Dwarkanath to hold a local investigation in this case. He examined a

certain number of ryots brought forward by both parties, and made his report to the effect that, in his opinion, one rupee per beegah was the prevailing rate. The second Ameen, Dwarkanath, examined no less than fifty ryots, and reported that, in his opinion, the proper rate of enhancement ought to be three Rupees per beegah. Now, if Ameens are merely to examine witnesses, and to send up their depositions with their own surmises as to what ought to be the decision of the case, and then again, if the report of the last Ameen is alone to be taken into consideration, without any allusion to the report of those who precede him, as has been done in the present case, no satisfactory result can possibly be arrived at. The evidence of the ryots examined by the two Ameens in the present case, so far as that evidence goes, might have been as well taken by the Court itself as by the Ameens; and I think it to have been a manifest departure from the intention of the Legislature to allow witnesses to be examined out of Court by Ameens, except with reference to points, for the determination of which a local investigation is legitimately required. It is of the utmost importance to the ends of justice to insist upon the examination of witnesses in open Court and by the Court itself. This should always be observed as a general rule by which all Courts are bound, and any deviation from this rule ought not to be permitted, except in cases in which the Legislature has expressly sanctioned it; as, for instance, where witnesses are to be examined by Commission, or where an Ameen deputed to hold local investigation thinks it necessary to examine witnesses on the spot with reference to such matters as fall within the legitimate scope of the enquiry entrusted to him. I would therefore reverse the decision of the Judge, and remand the case to him for a fresh investigation with reference to the foregoing remarks.

Loch, J.—I concur in the order of remand.

Special Appeal from Tirhoot.

CASES 1543 AND 1544 OF 1867.
4th January.

Sheo Dei Mahatoon, (Plaintiff) *Appellant, versus* Roy Hurry Kishen, (Defendant) *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Mr. R. E. Twidale for Appellant.
Mr. C. Gregory for Respondent.

Where plaintiff sues to obtain a pottah at certain rates, the point for enquiry is his right to obtain a pottah at such rates. If he be proved only to have a right of occupancy, the Court may proceed to determine the fair and equitable rates, even though his original claim was to hold at certain fixed rates, and though the defendant zemindar may have given no notice of enhancement.

In this case plaintiff sued to obtain a pottah at the rates entered in a previous pottah which expired in 1272, and he alleges that he and his ancestors have held the land for several generations. The defendant denied the plaintiff's right to hold at a fixed rate, alleging that his tenancy commenced only in 1268, and that he refused to give a fresh pottah because the capabilities of the land had, during the period of plaintiff's lease, considerably improved. The Deputy Collector found that plaintiff had a right of occupancy, but not to hold at a fixed rate; and he gave him a pottah for the current year at the rates mentioned in the former lease. On appeal, by defendant, the Judge held that the plaintiff's suit was brought under Section 4, Act X of 1859, and that he did not pray for rates at a fair rent under Section 5; and that, having failed to establish his right to hold the land at a fixed rent, he could not, in this suit, ask the Court to assess the land at fair rates. He therefore reversed the order of the first Court, and dismissed the suit.

We think the proceedings of both Courts to be erroneous The first Court was wrong in supposing that the question of the proper rate of rent could not be tried, because the defendant zemindar had served no notice of enhancement; for this is not necessary when a tenant brings a suit to get a pottah, and the zemindar alleges that the rates offered are too low. The question to be determined in such cases is the tenant's right to get a pottah at the rates he asks. If he claims to hold under fixed rates, that question must first be disposed of; and if he fail on this point, there is no reason why the Court should not proceed to determine whether the rates, as stated by defendant, are fair and equitable, if the

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plaintiff prove that he has a right of occupancy. In this case, however, plaintiff merely asked for a renewal of his lease on the former terms; and, as in the opinion of the first Court, he had proved a right of occupancy, the Deputy Collector should have proceeded to determine what rates should be imposed. We think also that the Judge was in error in thinking that the question of rates could not be disposed of in this case. There was really nothing in the form of the pleadings to prevent this being done. We find, however, that another question before that of rates must be decided, *viz.*, the plaintiff's right of occupancy which the defendant denies before the Judge in appeal. The Judge must determine whether the plaintiff has a right of occupancy, and then he should proceed to determine the rate at which plaintiff should receive a pottah. The case is remanded for disposal with reference to the above remarks.

CASE 104 OF 1867.

6th January.

Special Appeal from Nuddea.

Sree Gopaul Paul Chowdhry and others, (Defendants) *Appellants, versus* Tarinee Purshad Ghose and others, (Plaintiffs) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Baboos Bhowanee Churn Dutt and *Sreenath Dass* for Appellants.
Baboo Mohendro Lall Shome for Respondents.

A clause in a kabooleut by which a man binds himself and his heirs never to relinquish a certain jote, cannot be binding on those heirs in face of the special provisions of the Rent law in regard to relinquishment.

Bayley, J.—In this case plaintiff sued defendant for rent of the year 1271, B. S., on the specific terms of a kabooleut executed by defendant's father, in which the father set forth that the kabooleut should be binding on his heirs for ever, and that a relinquishment of the jote should never be permitted.

The defendant's answer was that he was ignorant of the genuineness of, the kabooleut, and that he relinquished the jote in 1270, B. S., the year before that the rent of which is sued for, and that the father's deed could not bind defendant never to relinquish a tenure when the law clearly enacted (Section 191, Act X of 1859) that that power should be with a tenant under certain defined provisions.

It was finally held by both the Lower Courts that the kabooleut was a genuine one.

How far it bound defendant not to relinquish his jote, both the Courts held that the kabooleut of the father had been accepted by defendants with its profit and loss, and that therefore defendant was bound to pay the rent sued for of 1271.

The Lower Appellate Court ruled (citing Kassy Roy's case, May 9th, 1866, Wyman's Reporter, Volume 1, page 64, Rent Suits,) that the general provision of Section 19, Act X of 1859, could not prevail against such express stipulations as were set forth in this kabooleut; and it was added that defendant might bring a regular suit to set aside the kabooleut.

Defendant appeals specially. There is no further plea urged before us as to the genuineness of the kabooleut, but it is strongly pressed on us that, assuming the kabooleut to be genuine, it cannot bind the defendant.

I think the Lower Courts are wrong. There seems no doubt that the defendant tendered his resignation of the jote legally in the way prescribed by Section 19, Act X of 1859, in 1270, a year before that for which the rent is sued for. Great stress is laid by the special respondent on the point that the defendant took his father's place on the terms of the kabooleut, and with it profits of the tenure up to 1270, B. S., and that therefore he is bound by the other terms of the kabooleut, *i. e.*, never to relinquish the jote. But, in my opinion, such a plea cannot be allowed to over-ride the distinct provision of Section XIX, Act X of 1859. The suit is brought under that Act, and its provisions seem to me to apply to both parties alike. One of those provisions are that "any ryot may relinquish his tenure on giving a certain notice," &c.

The case relied on by the Lower Appellate Court, *viz.*, Kassy Singh, page 64, Wyman's Reporter, Volume I, is quite different from this case, both in its facts

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6th January.
CIVIL JURISDICTION.
RENT SUITS.

and in its law. There the defendant himself had covenanted for a five years' lease, and threw it up in its currency. Here the defendant has entered into no such covenant, and there is no period of the lease. The law therein laid down was that, when the ryot defendant had entered into a contract in a way not contrary to law, he was not to break his contract. But I think a perpetual contract by a party for his heirs, and reciting that they shall never relinquish the jote, cannot operate against the law, which says "any ryot may relinquish his jote if he does so in a legal manner."

In this view I would decree the appeal.

Phear, J.—I concur. I wish also to say that I entirely agree in the opinion expressed by the Judges who decided Kassy Singh *versus* Omaet and another; but it seems to me that an undertaking by a man on the part of himself and his heirs for ever not to relinquish is not a special contract of the nature which was contemplated by the Court in that case.

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21st December.
CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Tipperah.

Bhoyrub Chunder Pundit *versus* Hussun Alli Chowdhry.

Before *Kemp* and *Dwarka Nauth Mitter*, J. J.

Where two charges are brought against a defendant, one triable under Chapter XIV, C. P C. and the other under Chapter XV, it is not competent to the Court to award compensation to him under Section 270 on account of the first charge, merely because the second was tacked on to it.

Read a letter from the Sessions Judge of Tipperah bearing date the 28th November, 1867.

We are of opinion that the Deputy Magistrate who tried this case is clearly wrong in awarding damages to the defendant, Hussun Alli Chowdhry, under the provisions of Section 270 of the Code of Criminal Procedure. The case before him clearly fell within the purview of Chapter XIV Code of Criminal Procedure. The fact that a charge of assault, under Section 352, was brought by the prosecutor against the defendant, in addition to that of wrongful confinement, under Section 347 of the Indian Penal Code, is of no importance whatsoever. It does not take the case out of the limits of that Chapter. It has been already decided that amends, under Section 270, can only be allowed in cases falling under Chapter XV Criminal Procedure Code; and in this ruling we entirely concur. That portion of the Deputy Magistrate's order which awarded damages to the defendant, Hussun Alli, must be reversed, and the money, if paid in, must be refunded.

JANUARY, 1868.

A. GROTE AND E. T. TREVOR, ESQRS.

No. 5.

Instead of the words "Clause 17" in Rule 3 of the Board's Rules, page 190, substitute "Clause 19."

Instances of disregard of the aforesaid Rule 3 having frequently come to the knowledge of the Board, they desire that the strictest attention be paid by all revenue officers to its requirements.

No. 6.

The authority given by Government to Collectors and Commissioners to sanction the appearance of Agents under Section 35, Act XX of 1865, as referred to in Board's Rule 17 of the Revenue Rules, page 195, appears to be sometimes misapplied, and a misapprehension exists as to the Stamps required for general and special powers under that Section. The Board therefore direct the following additions to be made at the end of Section IV, Chapter XII, page 195 of the Revenue Rules.

To Clause 17 add :—

"Great discretion must be used in granting such sanction, which should be accorded only under special and exceptional circumstances."

18. A general power of attorney, under Section XXX, must be written on a stamp of 4 rupees, and a special one, to be filed in each case, on a stamp of 8 annas, as provided by the Stamp Law.

No. 7.

It has been ruled by the Government of India, in Orders No. 3198, dated 30th December, 1867, that "Clerks employed in the Police are liable, but Police Officers employed as Clerks cannot be held to be liable, to pay License Tax, if they be in the grades which by law are exempted from payment of the tax."

No. 8.

The following is to be substituted for present Rule 7, at page 280 of the Board's Rules :—

7. Where an enhanced rent has been imposed in the course of a settlement, the names of all ryots who have not recorded their assent to the same on the jummabundi, should be specified in the Settlement Proceeding, with a view to the proprietor or farmer, who may enter into engagements, serving the necessary notice on them under Section 13, Act X of 1859.

No. 9.

With advertence to the orders of the Government of India, No. 3200, dated 30th December, 1867, it is notified that, upon application being made for a license under the License Tax Act, the Collector, or other Licensing Officer should enquire of the applicant whether he has mentioned all the places at which he carries on business, and has given a return of his entire profits.

2. Shareholders of an ordinary partnership must be rated upon their respective profits.

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January.
REVENUE CIRCULARS
(*Continued*)

No. 10.

The Superintendent of Stationery has been directed to supply District Officers with revised forms of Returns Nos XXVIII and XLI. These returns must be carefully filled up, and submitted to the Board on the due date.

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ..	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Wednesday ...	Ditto ... Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given and a list made out ...	Miscellaneous Appeals.	
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Sp cial Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Friday ...	The Chief Justice .. Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter .. Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

Note.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars).	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
Bograh	Noakhally	Purneah	Rajshahye
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THE

REVENUE, CIVIL,

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CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS, WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

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Regular Appeal from Mymensingh.

1868.

3rd January.
CIVIL JURISDICTION.

CASES 98, 99, 104, AND 111 OF 1867.

Shibdyal Tewary, (one of the Defendants) *Appellant, versus* Juddoo Nath Tewary, (Plaintiff) and others, Defendants, *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboos Kallee Mohun Doss and *Romesh Chunder Mitter* for Appellant.

Mr. Cowie and *Baboos Kallee Prosunno Dutt* and *Sreenauth Doss* for Respondents.

1. Nature of the rights of a Hindoo widowed mother in a joint estate under Mitakshara law. When partition has actually been carried out, she can claim a share, but not before. Till then she has only a right to maintenance, and has no power to alienate, in anticipation of partition, the share which, for the purposes of maintenance, would be assigned to her after partition.

2. The Court in awarding costs has full discretion to consider all the circumstances of the case, and is not bound to award costs in proportion to the amount decreed.

3. The rule of equal division of joint family property holds good, save where one member of the family by his own labor and capital has acquired property, in which case he takes a double share of his own acquisition. But mere augmentation of the joint stock by the exertions of the managing member of the family is not an acquisition of the kind above contemplated.

These appeals have arisen out of three original suits instituted in the Court of the Principal Sudder Ameen of Mymensingh. The facts disclosed by the pleadings in these three suits have been set forth at length in the judgments recorded by that officer, and we think it therefore unnecessary to recapitulate them in this place. The real contest between the parties is about the division of a joint undivided estate, and the principal questions to be determined are the extent of that estate, and the shares in which, and the persons between whom, the division is to be effected. At the request of the parties, all the cases have been heard together, both here and in the Court below, and the evidence produced in each has been fully used for the purposes of all by their consent. For the sake of convenience, however, we think it necessary to deal with these appeals separately in our judgment.

In appeal No. 111 of 1867 the following points have been raised before us on behalf of the appellant Juddoo Nath Tewary :—

First.—That the finding of the Lower Court against the genuineness of the furd put forward by the respondent, Shibdyal Tewary, in suit No. 82 of 1866, is contrary to the weight of evidence.

Secondly.—That even if the furd be rejected as spurious, a larger amount of cash balance than that fixed by the Lower Court ought to be found in the hands of the respondent Bissonath Tewary, and that a joint decree for the appellant's share of this amount ought to be passed, both against him and the respondent Shibdyal.

Thirdly.—That the Lower Court is wrong in declaring that Mussamut Golaba (now deceased) was entitled to a share of the family property, she being not entitled to any share under the Hindoo law as administered in the Benares School.

Fourthly.—That the above declaration has been rendered nugatory by the death of Golaba since the decree of the Lower Court, and before any partition of the family estate has been actually effected.

Fifthly.—That the award of the Lower Court in the matter of costs is unjust and inequitable.

[It is unnecessary to reproduce the judgment of the Court on the first two grounds of appeal, as it turned merely upon an examination of the evidence in the case. The judgment on the third and following grounds was as follows.]

With reference to the third ground, we do not think it necessary for us to decide upon it. Our reasons will be explained in our judgment upon the next ground.

As to the fourth ground, we are of opinion that the contention of the appellant is correct. Mussamut Golaba was the mother of Shibdyal, and grandmother of the appellant. Bissonath is the first cousin or paternal uncle's son of Shibdyal. She, Mussamut Golaba, died subsequent to the decree of the Lower Court, and Mussamut Doolaro, wife of Shibdyal, as an alleged devisee under her, has been permitted by us to defend this appeal. Now it is quite clear that the share which ought to have been allowed to Golaba has merged in the general estate, conceding, for the sake of argument, that she was entitled to any share under the Hindoo law as it is administered in the Benares School. The text of the Mitakshara that has been referred to merely says :—"Of heirs dividing after the death of the father, let the mother also take a share;" or, in other words, the mother or the grandmother, as the case might be, is entitled to a share

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3rd January.
CIVIL JURISDICTION.

when sons or grandsons divide the family estate between themselves. But the mother or the grandmother can never be recognized as the owner of such a share until the division has been actually made. She has no pre-existing vested right in the estate, except a right of maintenance. She may acquire property by partition, for partition is one of the recognized modes of acquiring property under the Hindoo law. But partition in her case is the sole cause of her right to the property. It follows, therefore, that the effect cannot precede the cause. The learned counsel for Doolaro has contended that, in the case before us, partition must be held to have actually taken place; and he cited a ruling of Her Majesty in Council, to the effect that division by metes and bounds is not at all necessary to constitute partition under the Mitakshara. We do not for a moment, in fact we cannot, question the correctness of this ruling. But there can be no doubt that, under the Hindoo law, two things at least are necessary to constitute partition: the shares must be defined, and there must be distinct and independent enjoyment of those shares. In the case before us neither of these things has yet taken place. The definition of the shares by the Principal Sudder Ameen is no more final than our judgment at the present day; and it is the question of shares that we are still determining. As to distinct and independent enjoyment, no such thing has yet occurred. The appellant has been merely seeking for a partition. Suppose that the appellant were to withdraw this appeal at this very moment, and to agree to live jointly with his uncle Shibdyal in estate as before, could Golaba, if she were alive, have still asked for the share allotted to her by the Principal Sudder Ameen? Or suppose that Golaba, instead of appearing as an intervenor in the Lower Court, as she did under Section 73 of the Procedure Code, had brought an action against them both for the arrears of her maintenance which would have accrued subsequent to the decree of the Lower Court, down to the present day, what answer could they have given to such a claim? Surely they could not have pleaded that she was not entitled to be maintained out of the estate, because they were going to make over to her a share of it. Such a plea would be absurd on the very face of it. She is not to starve until the assignment is actually made. It has been said that the question of maintenance is quite distinct from the question before us; but there can be no doubt that the share that is given to a Hindoo mother at the time of partition is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share; and if a partition has been effected in this case, Golaba's suit for maintenance must have been dismissed on that ground alone. It is unnecessary therefore to decide whether Golaba had a right to alienate the share assigned to her by the Principal Sudder Ameen as her streedhun under the Mitakshara law. Our finding is that she had acquired no right to that share, as she died before partition had been actually made. We therefore direct that the family estate, real and personal, such as it may be found to be, shall be divided between the three original parties to this suit, namely, Shibdyal, Bissonath, and the appellant Juddoonath, in the following proportions:—

Shibdyal	...	...	5 annas.
Bissonath	...	...	7 annas.
Judoonath	...	...	4 annas.

As to the last ground, we are of opinion that the contention of the appellant is perfectly correct. The question of costs is the most general question to be determined in a suit. In fact, it is the only question over which the Court can exercise the largest discretion. This discretion, however, is to be exercised with special reference to all the circumstances of the case, including the conduct of parties. It is not correct in law or justice to say that costs must be invariably awarded in proportion to the amounts decreed and dismissed. If, for instance, we find, as in the present case, that the appellant has mainly succeeded in his claim, that his suit was an honest and *bona fide* one, that the portion dismissed has been lost more in consequence of the misconduct of his opponents than on account of any fault of his own, we shall be doing injustice to the appellant to refuse him his full costs. We accordingly direct that the

costs of this litigation in full shall be paid to him by both the respondents, Shibdyal and Bissonath, and that these latter shall bear their own costs throughout. Mussamut Doolaro, of course, has to bear her own costs.

We now come to Shibdyal's appeal, No. 98 of 1867. The following point has been urged before us on his behalf:—

First.—That Shibdyal, having been the acquirer of those properties which still stand in his name, is entitled to a double share under the Hindoo law.

With reference to the first point, we are of opinion that it is not at all sound. This case is not a case in which a double share can be awarded. It has been said that Shibdyal contributed both money and labour in acquiring these properties, though joint funds have also been used There is no pretension to say now, whatever might have been pleaded in the Court below, that there is no joint property at all; so that the admission regarding the use of joint funds is perfectly correct. So far as the evidence is concerned, we have neither any proof of the amount of the money supplied, nor the purposes for which it was used, and the labour that consisted in purchasing estates out of the funds of a joint ancestral firm, which Shibdyal was managing for the benefit of the joint family. But even conceding all these facts to the appellant, we do not see how he can succeed in his contention. The very authorities relied upon by him are strongly and expressly against him. Verse 29, Chapter 1, Section 4 of Mr. Colebrooke's Mitakshara, page 275, says:— "It is settled that whatever is acquired at the charge of the patrimony is subject to partition;" but Verse 30 qualifies this proposition by propounding an exception, and Verse 31 explains that exception. Verse 30 says:—"The author propounds an exception to this rule. But if the common stock be improved, an equal share is ordained;" and Verse 30 says:—"Among unseparated brethren, if the common stock is improved or augmented through agriculture, commerce, or similar means, an equal division, nevertheless, takes place, and a double share is not allotted to the acquirer." This is no more than a case of augmentation at the highest. The ancestral firm was the main nucleus of this estate, and every property acquired from such a nucleus falls within the rule of equal division. Verse 29 applies to a different state of things. Where a co-parcener, with comparatively small detriment to the joint estate, acquires any separate property by his own labour or capital, the property is, nevertheless, to be considered as joint, although the acquirer gets a double share. Here, strictly speaking, there is no proof of Shibdyal having supplied any portion of the money required for the purchase of the properties in question from his own funds; and as to labour, his case does not stand higher than that of a manager of a joint undivided family. In our opinion, it is not even a case of augmentation. The mere conversion of joint funds into land is not an acquisition within the meaning of the Hindoo law. The labour of a manager is not a means for acquiring separate property. It was labour voluntarily undergone for the benefit of the joint family. We hold, therefore, that the case before us neither falls within the rule laid down in Verse 29, nor within the exception in Verse 30, and must therefore be treated as an ordinary case of joint property.

Special Appeal from Bhaugulpore.

CASE 1119 OF 1867

8th January.

Mussamut Woozeerun, (Plaintiff) *Appellant, versus* Mirza Nooruljan and others, (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Baboos Juggodanund Mookerjee and *Romesh Chunder Mitter* for Appellant.
Baboo Luckhee Churn Bose for Respondents.

Jackson, J.—The plaintiff in this suit asked for confirmation of his possession in a certain estate, and recovery of possession of fifteen beegahs of which the defendant had ousted him. He admitted that his brother Nawab Jan had inherited a 7-anna share of the estate with him, and that the defendant held

Plaintiff sued for confirmation of possession, alleging that he had been in sole possession of the

1868.

8th *January*.
CIVIL JURISDICTION.

estate for many years. *Held*, that, as regards part of the estate registered in the name of a brother absent on service, such possession must be clearly shown to be adverse before it could avail plaintiff as proof of title. Recital of the brother's share in a document executed among the other members of the family is strong evidence

under a deed of sale from Nawab Jan, but his averment was that Nawab Jan had been all his life absent in Moorshedabad, and that the possession of the estate had always been in his hands, with the exception of 2 annas, which, however, his mother had made a gift of to him.

The Principal Sudder Ameen has found that the actual possession of the estate was so far with the plaintiff, inasmuch as the defendant was absent in Moorshedabad, but he has also found that the names of the two brothers were jointly registered in the Collectorate, and jointly appeared as proprietors in a kubooleut in 1836, and subsequently, on the occasion of the gift by the mother to the plaintiff of her 2 annas in the year 1854, the deed recited the fact that the brother Nawab Jan was entitled to 7 annas of the estate, and actually held possession of it; which deed was duly registered and made public before the Cazee. The Principal Sudder Ameen considers, on this evidence, that the right and title of Nawab Jan had never lapsed, and, indeed, plaintiff does not attempt to show that it did lapse in any way, but he asks the Court to enforce his possession on the strength of his long possession alone.

The Principal Sudder Ameen having dismissed plaintiff's claim to possession of 7 annas of the estate, which he held was proved to belong of right to the defendant, Nawab Jan's vendee, the plaintiff, on special appeal, asks this Court to confirm his title by prescription, as the Principal Sudder Ameen finds his possession proved.

We have read the Principal Sudder Ameen's judgment, and we are of opinion that his remarks as to possession allude to the presence of the plaintiff on the estate, and the absence of the brother Nawab Jan in Moorshedabad, and that his subsequent reference to the Collectorate Registers, the kubooleut, and the deed, as proving that the right and possession of the brother had not altogether ceased, shew that he did not consider the possession of the plaintiff to have been adverse to that of his brother, but rather to have been in his behalf.

A long argument has been addressed to us to the effect that the recital in the deed, as between the mother and son, is no evidence, and should have been rejected in the suit between the two brothers. We think the conduct of the parties to that deed, near relatives disposing of a portion of the estate, and taking the opportunity to record the position of the family in the estate, to be most important evidence in the case, the more so when we find that the plaintiff gave greater significance to the facts so recorded, facts more particularly within his own cognizance, by having them publicly registered before a Cazee.

We therefore dismiss this appeal with costs.

Kemp, J.—I concur with my learned colleague in dismissing this appeal.

The case of the plaintiff is briefly this:—Mirza Jafer Beg was the common ancestor. He died in 1815, leaving as his heir a son, Mirza Moful Beg, who died in 1820, leaving a widow, Bibee Jan, and two sons, Nawab Jan and Akul Jan. It is averred that the elder son, Nawab Jan, during the lifetime of his father, Mirza Moful Beg, left the family residence in Zillah Bhaugulpore and went to reside in Zillah Moorshedabad; that he never returned to his home; that on the death of Moful Beg, his widow, Bibee Jan, succeeded to a 2-anna share, and his son, Akul Jan, to a 14-anna share in the estate. Akul Jan died, it is said, in 1836, leaving a widow, the plaintiff, special appellant before us. She succeeded to her husband's share of 14 annas, *plus* the 2 annas share of her mother-in-law, Bibee Jan, by deed of gift, or altogether to 16 annas.

The absent brother, Nawab Jan, has conveyed his title in the estate of Mirza Jafer Beg to the defendant, Chuttur Dharee Singh, who has again sold to Dhurm Singh, who obtained registry of his name in the mutation register under the orders of the Revenue authorities, dated 14th May, 1864.

The object of the present suit is for confirmation of the plaintiff, special appellant's possession over the whole estate, and for recovery of possession of 15 beegahs of land from which she alleges ouster in 1272 Fuslee, for the reversal of the order of the Revenue authorities, and to set aside the deed of conveyance to the defendants.

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8th January.

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The defendants answered briefly to this effect, that as Akul Jan, the husband of the plaintiff, died leaving a widow, the plaintiff, and a son, one Diljan, the share of the plaintiff in her husband's estate, according to the Mahomedan law, was only one-eighth; and further, that her claim was barred under the Statute of Limitation, as the defendant's vendor, Nawab Jan, and his mother, Bibee Jan, were in possession of the estate after Mirza Moful Beg's death, and not the plaintiff.

Both the Lower Courts found that the plaintiff's suit was not barred; that the deed of gift by Bibee Jan to the plaintiff was proved; but that, according to the Mahomedan law of inheritance, the plaintiff was entitled to a 9-anna share only, that is to say, to 7 annas in right of her husband Akul Jan, and to 2 annas by gift from Bibee Jan, and that the remaining 7 annas share was the estate of Nawab Jan, by whom it had been conveyed to the defendants. The plaintiff's claim was therefore decreed in a modified form, *viz.*, over 9 annas only.

The special appellant contends that, as the Principal Sudder Ameen finds that the plaintiff has held long and uninterrupted possession of the whole estate, and that Nawab Jan was never in possession, the plaintiff has acquired a title over the whole estate by prescription, inasmuch as it is not enough for the defendant to show a title in his vendor, unless such title is not barred by lapse of time; that the recitals in the deed of gift by Bibee Jan, *quoad* the share of Nawab Jan, are not binding upon Bibee Jan's donee, the plaintiff; that the income tax returns should not have been accepted by the Principal Sudder Ameen as evidence, particularly as the plaintiff denied having filed them.

I have no doubt that the Principal Sudder Ameen, upholding as he did the decision of the first Court, substantially found that the possession of the plaintiff, and her husband before her, was not adverse to the absent brother, Nawab Jan, the defendant's vendor. The title of Nawab Jan is not disputed, but it is urged by the pleader for the special appellant that long possession must override that title, which, however good, has been lost by lapse of time.

There can be no doubt that possession is *primâ facie* proof of title; but in a case like the present, where the two brothers were members of the same family, and admittedly succeeded to equal shares in the estate, *i. e.*, to 7 annas each, the mere fact of one brother being absent on service or for any other reason, and the home-staying brother being in possession for himself, and as trustee for his absent brother, will not deprive the latter of his right of inheritance, unless it be clearly shewn that the possession of the brother staying at home was adverse to the absent brother.

The plaintiff coming into Court for confirmation of her possession, seems to me to indicate very plainly that she never held adverse possession as against the defendant's vendor, Nawab Jan. The recital in the deed of gift, on which the plaintiff relies as the basis of her claim to the share which has devolved to her by gift from Bibee Jan, to the effect that Nawab Jan's share was 7 annas, of which he was in possession, seems to me, if not altogether conclusive, to be a very weighty piece of evidence. This gift was executed within 12 years prior to the present suit, and the distribution of the family property in that deed was clearly tacitly assented to by the plaintiff, who, moreover, procured the registry of the deed. The Revenue authorities registered the name of the defendant's vendor on the mutation roll. This must have been done on proof of his joint possession, although an absentee.

Holding, therefore, that neither the possession of the plaintiff, nor of her husband was ever adverse to the defendant's vendor, and as the title of the defendant's vendor is admitted, I concur in dismissing this appeal with costs and interest.

1868.

9th January.

CIVIL JURISDICTION.

CASE 169 OF 1867.

Application for Review of Judgment in Special Appeal No. 1248 *of* 1866, *dated the* 8th *August*, 1866.

Heranund Shahoo, *Petitioner*, *versus* Mussamut Wuzeerun and others, *Opposite Party*.

Before *Bayley* and *Phear*, J. J.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Petitioner.
Mr. C. Gregory for Opposite Party.

A right to receive malikana is not a perpetually-recurring cause of action like the right to receive rent. It is an interest in land, and cannot be sued for when it has not been enjoyed for over twelve years back.

Phear, J.—It seems to me that the right to receive malikana is a distinct proprietary right, and that it constitutes an interest in land. It is, in truth, very much of the nature of a rent charge. Therefore I think that if there has been no enjoyment of malikana for a period of twelve years, the right to sue for money receivable under it is barred by Clause 12, Section 1 of Act XIV of 1859. The petition ought, in my view, to be rejected with costs.

Bayley, J.—Malikana is, in fact, a deduction from the assets of a Government settled estate of a sum which is payable to proprietors in consideration of their position as such, and of their relation to Government as the payers of revenue. The question is whether, coming from the rents which form the above assets, the law of limitation is to be applied to malikana as to rents which are a perpetually-recurring cause of action, or whether that law shall be applied as to an interest in land, being of the nature of property, and not the same as rents.

After fully hearing the counsel, and considering the circumstances, I am of opinion that malikana is an interest in land, not rents, and that therefore the proper law of limitation is that applying to an interest in land, *viz*, Clause 12, Section 1, Act XIV of 1859. In this view, I would reject the petition.

CASE 422 OF 1867.

9th January.

Miscellaneous Appeal from East Burdwan.

Juggut Mohinee Bebee, (Decree-holder) *Appellant*, *versus* Ram Chand Ghose and others, (Judgment-debtors) *Respondents*.

Before *Loch* and *Hobhouse*, J. J.

Baboos Chunder Madhub Ghose and *Shushee Bhoosun Bose* for Appellant.
Baboos Tarruck Nath Sein and *Romanath Bose* for Respondents.

The formal confirmation by the Court of a sale in execution of a decree is not a proceeding on the part of the decree-holder to execute his decree. Limitation runs from the last act of the decree-holder himself in execution, not from the date of subsequent action of the Court.

The decree-holder in this case sold certain property of the judgment-debtor on the 9th March, 1863. The sale was confirmed on or about the 7th April, 1863. The next application on which the decree-holder relies is of date the 14th March, 1866, and his pleader contends that the law permits him to date from the 7th April, 1863, and that his application of the 4th March, 1866, is, under Section 20, Act XIV, 1859, in time.

We think that this contention is not sound. The mere formal confirmation by the Court of a sale cannot be said to be a proceeding on the part of a decree-holder to execute his decree, and cannot therefore save the decree in this instance. The last proceeding of the decree-holder was taken on the 9th March, 1863, and as he did not again legally apply until the 14th March, 1866, his remedy is barred.

We dismiss the appeal with costs.

Special Appeal from Tirhoot.

1868

10th January

CIVIL JURISDICTION.

CASE 164 OF 1867

Moonshee Full Chand Lall, (Plaintiff) *Appellant, versus* Baboo Rugoobuns Sahae and others, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J.

Baboos Khettur Nath Bose and *Debendro Narain Bose* for Appellant
Baboo Chunder Madhub Ghose for Respondent.

Injunction to Mofussil Courts not to entertain unnecessary and superfluous suits for declaratory decrees.

I think the Judge is wrong in this case, because he has substantially determined that the appellant had no right, and that the deed was void He ought simply to have declared that the plaintiff had not shown a sufficient cause to induce the Court to interfere under Section 15 of Act VIII of 1859, and to declare that he had a right, and ought to have his possession confirmed.

The decision of the Judge and of the Lower Court should be reversed, upon the ground that the plaintiff has not made out sufficient cause for a declaration of his right.

Each party will bear his own costs of this appeal, and his costs in the Lower Courts.

I frequently find that in the Mofussil parties are not satisfied to have their rights determined in one suit, and that they prefer having the same question determined in two different suits,—one, a suit to determine and enforce the rights of the parties; the other, to declare them. The parties are not the persons beneficially interested in these matters, but those who profit by the litigation. The Court ought to set its face as much as possible against such proceedings Considering, however, that the reversionary heirs were objecting to the plaintiff's title, and the practice which has hitherto prevailed of instituting suits for declarations of right and confirmations of possession, and other similar suits, we do not think it necessary to order the plaintiff to pay the costs in this case. That is our reason for not awarding costs against him, notwithstanding he has failed in his suit; but after this intimation, the Court, we think, ought to be more particular in giving decrees in these suits merely for declarations of right when no substantial relief is sought for, especially in cases in which the question of title is raised in another suit between the same parties for enforcing the right of the opposite party. In this case one party sues to set aside a deed, and the other sues to declare that the deed is valid, and to confirm his possession under it. Both cases have gone through three different Courts, and full stamps have been paid upon each, when one suit was sufficient to determine the whole question between the parties.

Special Appeal from Tirhoot.

CASE 1664 OF 1867.

10th January.

Full Chand Lall and others, (Defendants) *Appellants, versus* Rughoobuns Sahaye, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J.

Baboos Debendro Narain Bose and *Khettur Nath Bose* for Appellants.
Baboo Chunder Madhub Ghose for Respondent.

Powers of a Hindoo widow to sell or mortgage her deceased husband's estate. Where she acted under pressure of a legal necessity, but sold more than was absolutely required, the reversioner could only set the sale aside by paying the

This is a suit brought by the plaintiff against the widow of Nursing Sahaye, deceased, who was a cousin of the plaintiff, the plaintiff and Nursing Sahaye being the sons of two brothers. Nursing having died without male issue, the plaintiffs claim under the Mitakshara law to be the reversionary heirs of Nursing upon the death of his widow, and the suit is brought for determination of right of inheritance by setting aside several deeds of sale by the widow of various parts of her deceased husband's estate, one of which is the subject-matter of this appeal. If there were any necessity, such as the Hindoo law warranted, for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the

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amount the widow was entitled to raise, with interest. Similarly, where the widow sold when she might more profitably have mortgaged, the reversioner could only set aside the sale by putting the purchaser in the position of a mortgagee.

A reversioner is not entitled to ask that the Court should declare that, on the death of the widow, the heirs to the estate might set aside the deeds of sale as above by paying what the widow had a right to raise; because it is uncertain who would be heirs at her death, and whether they would be willing so to pay, and such a decree would be unjust to the purchaser as leaving him for years in uncertainty.

Doubtful whether a widow is bound to mortgage, instead of selling.

law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise, with interest; and if the widow was not authorized to sell any part of the estate, because it would have been more beneficial for the reversioners that she should raise the amount by mortgage instead of sale, I am of opinion that the reversioners could not set aside the deed of sale without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged, instead of selling.

I am not at all sure that, even if it could be made out that it would have been more beneficial for the widow to mortgage, instead of selling, the purchase could be set aside. The widow takes a widow's estate by inheritance from her husband. It is not an absolute estate for all purposes, and it is not merely an estate for life; but she takes the estate of her husband for the benefit of her deceased husband, which includes her own maintenance and the performance of her religious duties, rather than for the benefit of those who may become the heirs of her husband upon her death. It is unnecessary in this case to determine whether, in any case, a widow is bound to mortgage. My impression is that if a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser if the widow and the purchaser are both acting honestly. It must be remarked that if a widow were bound to mortgage, the interest of the money raised by mortgage must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs.

The plaintiffs in this case brought their action in the lifetime of the widow, and she was one of the defendants. The death of the widow pending the suit could not alter the nature and object of the suit itself, and therefore we must see what the plaintiffs asked for as against the widow and the purchaser.

They did not ask to have the deed set aside, upon the ground that the widow had sold, whereas she ought to have mortgaged, offering to put the purchaser in the situation of a mortgagee; nor upon the ground that the widow had sold for the purpose of raising a larger amount than the law authorized her to raise, offering to pay to the purchaser the amount which the widow was lawfully authorized to raise. It is very unlikely that the plaintiffs, when they commenced this suit, would have been willing to pay to the purchaser out of their own pockets any amount which the widow might have been authorized to raise, because, even if they did so, and the deeds were set aside, they would not have been entitled to the estate during the widow's lifetime, and probably might never have been entitled to it at all; for it was only in the event of their surviving the widow, that they would have been entitled to the inheritance. They ask to determine the right of inheritance by setting aside the deeds, and they allege that those deeds were improperly executed, not because there was no necessity to raise any money, but because the money which was requisite could have been raised by other means.

If they had asked to have their own right of inheritance declared, they would have been premature, because it might happen that they would not survive the widow. They therefore, as reversioners, and being the persons entitled to protect the estate, asked, as I interpret the plaint, to have it declared that, upon the death of the widow, the right of inheritance would attach in the same way as if those deeds had never been executed; in other words, that the deeds would not be binding upon the heirs after the death of the widow. They did not mean to ask that the Court should declare that, upon the death of the widow, the persons, whoever they might be, who should be entitled to take by inheritance, might have the deeds set aside upon paying the amount which the widow was entitled to raise. If they had done so, they would have asked what, as it appears to me, they were not entitled to have. The Court could not properly have decreed in the lifetime of the widow that, upon her death, the deeds should be set aside upon payment by the persons who should succeed

to the estate of the amount which the widow was entitled to raise, inasmuch as it would be contingent upon the will of the persons who might succeed to the inheritance, whether they would pay the amount or not, and the purchaser could not properly have been placed by a decree of the Court in a position in which for many years he might remain in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would have been unjust to the purchaser, and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not.

Under these circumstances, it appears to me that the only question for the consideration of the Court is whether the deeds were absolutely void, upon the ground that the widow ought to have raised the money which was required by other means than by selling a portion of the estate. Even if we could go beyond the pleadings, we could not go further than to determine the issue whether the deeds were absolutely void, upon the ground that the widow was not authorized to raise any money at all.

Now, it appears that, with regard to the deed now under consideration, a portion of the purchase-money was raised for the purpose of paying Government revenue, a portion to pay off a debt incurred for the purpose of performing her husband's shradh, a portion to pay off a debt contracted to defray the funeral ceremonies of her husband, and a portion to pay off a decree which had been obtained against her husband. It appears to me that the widow was not committing waste by selling a portion of the estate to raise those sums, and that the purchaser was justified in advancing his money upon the representations of the widow that she considered it necessary to raise those moneys by selling, instead of raising the moneys, either upon the security of the estate by mortgage, or in any other way.

It is clear that the widow was not bound to borrow the money upon her own personal security, and to contract a debt which, if she should die before she could be able to repay it out of the profits of the estate, she would probably have no means of paying, and thus incur the guilt of the sin of leaving debts unpaid. I am also of opinion that the widow was not bound to borrow the money by mortgaging the estate, and thus necessarily reducing the income to which she was entitled during her lifetime for the maintenance of herself and her daughter, for the performance, if she thought necessary, of pilgrimage, and for other proper and necessary religious duties. But, as I have before remarked, it is not necessary to decide whether the widow could have raised the money by mortgaging the estate or a part of it, instead of selling. The suit is not brought to set aside the deeds upon putting the purchaser in the same position as that in which he would have been if he had advanced the money upon a mortgage of the estate, instead of paying it to the widow as the price of his purchase. If the decree of the Judge is right, and the deeds are to be absolutely set aside, and the heirs are to be entitled to take back the estate from the purchaser, because it has been sold, instead of being mortgaged, then the reversionary heirs are entitled to benefit by an honest mistake of the widow (for no fraud is imputed to her) in considering that it was better to sell than to mortgage.

We think that the decree of the Judge must be set aside, and the decree of the Lower Court dismissing the suit must be affirmed. The appellant will be entitled to the costs of this appeal, and to his costs in the Lower Appellate Court.

Special Appeal from Hooghly.

CASE 906 OF 1867.

14th January.

Suroop Chunder Nag, (one of the Defendants) *Appellant*, *versus* Bonomalee Pundit, (Plaintiff) *Respondent*.

Before *Bayley* and *Phear*, J. J.

Baboo Luckhee Churn Bose for Appellant.

Baboo Roma Nauth Bose for Respondent.

The year of grace allowed to the mortgagor within which

In this case the plaintiff has obtained from the Lower Appellate Court a decree for possession of two plots of land, on the ground that he is mortgagee, and has effected due foreclosure according to the Regulations.

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to redeem, and the year prescribed before completion of foreclosure by mortgagee, are concurrent, and run from the date of the issue by the Court of the notice of foreclosure to the mortgagor, not from the date of its service on him.

The mortgagor, special appellant, objects to this decree, so far as it affects one of the plots, contending that he had made a required deposit of the mortgage-money within the year of grace prescribed by Regulation XVII of 1806, and was therefore entitled to redeem.

As to this matter the material facts seem to be that a properly-executed perwannah, according to the provisions of Section 8, was delivered to the Nazir of the Court on the 5th August, 1864; that the peon's fees were deposited on the same day; that on the 23rd of August, 1864, the Nazir made over the perwannah to his peon for service; and, lastly, that the mortgagor deposited the money in Court on the 17th August, 1865.

The 7th Section of Regulation XVII of 1806 runs thus:—"In addition to the provisions made in the Provinces of Bengal, Behar, Orissa, and Benares by Regulation I, 1798, and in the ceded and conquered provinces by Regulation XXXIV of 1803, for the redemption of mortgages and conditional sales of lands under deeds, bye-bil-waffa, cut kobalah, or any similar designation, it is hereby provided that, when the mortgagee may have obtained possession of the land on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property before the mortgage is finally foreclosed in the manner provided for by the following Section; that is to say, at any time within one year (Bengal, Fussily, or Willaity, according to the era current where the mortgage may take place) from and after the application of the mortgagee to the Zillah or City Court of Dewanny Adawlut for foreclosing the mortgage, and rendering the sale conclusive, in conformity with Section 8 of this Regulation; provided that such payment or tender be clearly proved to have been made to the lender and mortgagee, or his legal representative, or that the amount due be deposited within the time above specified in the Dewanny Adawlut of the Zillah or city in which the mortgaged property may be situated, as allowed, for the security of the borrower and mortgagor, in such cases by Section 2, Regulation I, 1798, and Section 12, Regulation XXXIV, 1803, the whole of the provisions contained in which Sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year granted for an equitable right of redemption by this Regulation."

I take this to mean that the mortgagor shall, before the mortgage is foreclosed in the manner provided by the 8th Section, be entitled to the redemption of his property if (among other things) the amount due be deposited by him in the Zillah Court within one year (according to the era current where the mortgage may take place) from and after the application of the mortgagee to the Zillah Court for foreclosure in conformity with that 8th Section.

But the 8th Section, after prescribing the mode in which the mortgagee should make his application for foreclosure, provides that the Judge "receiving such written application shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall, at the same time, notify to him by a perwannah under his seal and official signature that if he shall not redeem the property mortgaged in the manner provided for by the 7th Section, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The language of these Sections is somewhat inexact. According to the last of them, it would appear that the mortgage becomes foreclosed only on the lapse of one year from the date of the notification to the mortgagor, which

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is to be made as soon as possible after the mortgagee's application for foreclosure; and the first entitles the mortgagor to redemption at any time before the mortgage is thus foreclosed, provided he deposit the money within one year from the mortgagee's application. Consequently, if the words be construed literally, the interval of one year, which must elapse before the mortgage becomes foreclosed, is not necessarily coincident with the year of grace within which the deposit is to be made.

At the same time, it is pretty clear that the Legislature intended to give the mortgagor the opportunity to redeem, so long as the mortgage remained unforeclosed; and accordingly it has been uniformly held that the mortgagee's "application" in the 7th Section means the whole transaction contemplated in Section 8, ending with the notification to the mortgagor Thus the year of grace for payment and the year necessary for completion of foreclosure commence to run from the date of the notification This conclusion still leaves it open to question whether by "date of the notification" is meant the date when the perwannah or document of notification is issued by the Court, or the date when it is served on the mortgagor Were the matter *res integra*, we should certainly have been inclined to the view that the Legislature intended the time to run from the service of the notice on the mortgagor The whole regulation was passed for the benefit of mortgagees, and with the special purpose of securing to them a period of grace after the mortgagee's announcement of his intention to foreclose, within which they might take the necessary steps to avert the foreclosure. This consideration alone would lead to the supposition that the point of time when notice of the intended foreclosure was given to the mortgagor, rather than one antecedent thereto, would be fixed as the starting point of the running against him of the year of grace. And the words actually used by the Legislature in Section 8 appear to confirm this supposition; for the Judge is there directed to "notify" to the mortgagor by a particular instrument that the mortgage will be foreclosed if he does not redeem within a year, and then the date of "the notification," and not that of the instrument by which it is to be made, is referred to as the commencement of that year It is difficult to escape the conviction that the word "notification" as here used meant the act of making known to the mortgagor However, a series of decisions, long acquiesced in, (by ourselves reluctantly in a former case) has determined that "date of notification" has reference to the making of the perwannah by the Judge, and not to its service on the mortgagor. It has also been held (Sudder Dewanny Adawlut, pages 627, 1477) that it does not mean the date of the document itself, *viz.*, the date of its being signed and sealed, but the date of its issue by the Court. This ruling, it must be said, finds but little countenance in anything which appears in Regulation XVII, and perhaps is not always capable of being easily applied We understand it, in effect, to lay down that no time should be counted against the mortgagor during which the perwannah, although it may be completed in all respects, is lying idle in the sheristah of the Court; and that whatever might be the actual date when the Court put its hand to the document, still it is not to be treated as a notification, within Section 8, until it has become an active order of Court. We are willing to concur in this view, considering as we do that the "notification" intended by the Legislature is not made until even a later period.

Turning now to the facts of the present case, we are of opinion that the perwannah was not issued as long as the Nazir kept it in his desk, and that it was, in fact, first issued when, on the 23rd August, 1864, it was handed to the peon for delivery. It follows that the deposit of the mortgagor was made in time, and that the Lower Appellate Court was wrong in decreeing foreclosure. This special appeal is therefore allowed, and so much of the judgment of the Lower Appellate Court as it appeals against is reversed with costs

Bayley, J.—I concur.

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CASE 112 OF 1867.

Regular Appeal from Maunbhoom.

Rajah Sree Sree Nilmonee Singh Deo Bahadoor, (Defendant) *Appellant, versus* Issur Chunder Ghosal, (Plaintiff) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Baboos Onocool Chunder Mookerjee, Bamachurn Banerjee, and *Tarrucknauth Sein* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

Plaintiff was induced by defendant to take a lease of jungle lands, in the assets of which lease many items were inserted, which were non-existent. He sued in the Civil Court (1) for damages and refund of excess rent paid, which he obtained; and (2) for abatement of future rent, in regard to which he was referred to the Revenue Court. He now sues for refund of rents paid in excess since the institution of his former suit. *Held*, that till the terms of his lease are modified by the Revenue Court, he is bound thereby; and having once obtained consequential damages on account of the injury sustained by him, owing to the misrepresentations of the lease, he cannot again sue as though fresh damage had accrued. He should have included the rent he would have to pay for the future in his estimate of damage then laid.

Phear, J.—This is the second of two suits brought by the present plaintiff against the present defendant. In the first suit the plaintiff complained that the defendant had induced him to take a putnee talook settlement at a certain yearly rent on fraudulent and false representations as to mouzahs and lands alleged to be contained in the lots settled, but which, the plaintiff asserted, he has since discovered did not exist. He therefore claimed to recover back a part of the consideration-money, and of the rents paid by him in proportion to the rent assessed in the settlement upon the mouzahs and lands found to be non-existent. He also sought to obtain an abatement of the same proportionate part of the rent for the future. This Court, on appeal, held that he had established the alleged fraudulent misrepresentations, and that he was entitled to be reimbursed the damages consequential thereto. These damages consisted of the excess moneys which he had paid, and which he had bound himself to pay under the putnee contract, beyond what he would, in all reasonable probability, have agreed to pay had not the misrepresentations been made to him, (for it must be remembered that by the very terms of his plaint he held to that contract, and did not repudiate it) together with the loss of profits which the absence of the missing mouzahs and lands would cause to him. On this view, the Court considered that all the money he claimed fell rightly under the head of consequential damages, and accordingly gave him a decree for the full amount; but, at the same time, it refused to give the declaration of right of abatement prayed for, on the ground that it had no jurisdiction to modify the contract between the parties.

In this second suit the plaintiff seeks to get back the so-called excess of rent for two years which he has paid to the defendant, in terms of the putnee pottah, since the date of institution of the first suit, and of which he prayed abatement in that first suit. He founds his right to recover this excess upon the same misconduct of the defendant as constituted the cause of action in the first suit. It seems to me that he ought not to succeed in his prayer. As long as the pottah remains in force, the defendant is entitled to be paid all the money due thereunder, and to keep that money when received. He has committed no wrong against the plaintiff since he made the misrepresentations referred to, which constituted the cause of action in the first suit. As I have already said, it was a legitimate consequence of those false misrepresentations that the plaintiff became lodged amid the obligations of this disadvantageous contract, and the damages which he has already recovered, from the effects of those misrepresentations, must be taken to cover this particular item of injury, as well as all others. It is his own fault if he did not include the rent which he would have to pay for the future in the estimate of damages which he formed and laid before the Court in the first instance. In truth, the plaintiff's present contention amounts to this, namely, that whenever the cause of action is such as to produce a successive recurrence of damage, then the person injured may bring a fresh suit on the occasion of the accrual of each portion of such damage. But I think this is clearly incorrect. In many cases of wrong, no doubt, the cause of suit is not complete until actual damage has ensued; but when once the cause of suit is matured, the subsequent occurrence of further damage, whether after or before this has been adjudicated upon, does not originate a fresh cause of suit. Were it otherwise, litigation would have no end; for I suppose that in very few cases does the damage flowing from a wrong

or a breach of contract cease with one event. I think therefore that, in the present case, the Court cannot give the plaintiff the decree which he asks without adjudication on the cause of action furnished by the original misrepresentation of the defendant. But that has already been adjudicated upon, and the issues between the parties in this suit must be the same as those which were expressly or impliedly determined in the suit wherein that adjudication was come to, with the single exception, perhaps, of the form of the one which would relate to damages. It seems to me that this suit is barred, and should be dismissed with costs.

Bayley, J.—I concur.

Special Appeal from Chota Nagpore.

CASE 987 OF 1867.

16*th January.*

Rajah Shib Lall Singh, (Plaintiff) *Appellant, versus* Moorad Khan and others, (Defendants) *Respondents.*

Before *Bayley* and *Markby*, J. J.

Baboo Anund Chunder Ghosal for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A grant of a tenure to a man and his heirs on condition of performing service does not imply that the service must be personally performed.

Markby, J.—In this case the plaintiff sued for the possession of certain lands that had been held for many years at a low quit-rent as service lands, and were now in the possession of the defendants.

There was considerable difference in the statements of the parties opposed as to how the lands eventually got into the hands of the defendants, but none whatever as to the terms under which they had been all along held, namely, under a grant to the tenants and their heirs at a quit-rent of 24 Rupees per annum, on the condition of the tenants performing service as door-keepers.

The Lower Appellate Court has expressed its opinion on one point, namely, that the tenants were not bound personally to perform the service, but that they were entitled to hold so long as the service was properly performed, and on this finding gave a decree in favor of the defendants.

I am satisfied that this was the only point raised before the Lower Appellate Court. The appellant now complains in his first and second grounds of appeal that the Lower Appellate Court did not enquire into the terms on which the lands were held, and into the validity of a deed of gift to which the defendants referred as the origin of their holding. But it is quite clear to me that none of this was in dispute. From the very first commencement of the suit, the nature of the tenure has been admitted; and it would have been altogether superfluous, for the purposes of this suit, to enquire how or when the tenure was created.

These remarks also dispose of the fifth ground of appeal. The lands in Keree, as well as the lands in Damoah, are admitted to be held on the tenure above described, and the Lower Appellate Court treats them quite properly without distinction.

The only real contention is that raised in the third ground of appeal, namely, whether there has been a forfeiture for non-performance of service. It has been contended now, as it was contended below, that the service must be performed personally; but I think that a grant to a man and his heirs on condition of performing service does not in general mean that the service is to be personally performed by the grantee or his heirs, but that it is to be performed, and that the grantee is to be responsible for its performance. It is inconsistent to grant land to a man and his heirs on the condition of performing service, and at the same time to require the service to be personally performed, because it is obvious that the word "heirs" includes a number of persons who are, or may be, unable to perform the service themselves. The only rational interpretation of such a grant is that above stated.

On the fourth ground of appeal, the appellant contends that, as the defendants were discharged for negligence, the right of re-entry has accrued, but the only negligence charged is that the services were not personally performed, which, as I have said, is not required by the conditions of the tenure.

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The sixth ground of appeal is not addressed to the decree, but only to an expression of the Judge as to the terms on which the lands are held. This is only a reiteration of the opinion he already expressed, and which I consider to be correct.

The appeal is therefore dismissed with costs.

Bayley, J.—I concur.

Miscellaneous Appeal from Tirhoot.

CASE 185 OF 1867.
31st January.

Chumun Lall Chowdhry and others, (Decree-holders) *Appellants, versus* Domun Lall and others, (Judgment-debtors) *Respondents.*

Before *Loch* and *Hobhouse*, J. J.

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

No one for Respondents.

Where the judgment creditor, for the debtor's convenience, agreed to postpone sale for a month, provided the attachment continued, and the Court allowed this, the fact that the Court struck the case off its file before expiry of the month would not cause the attachment to fall through.

In this case the special appellant, who is the decree-holder, attached the property of his judgment-debtor and advertised it for sale. At the request of the debtor, who sought to make arrangements for the payment of his debt by a private sale of the property, the decree-holder consented to an adjournment of the auction-sale for a month, the attachment of the property holding good. On the application of the parties, the Court adjourned the sale, and struck off the execution case from the file, directing, however, that the attachment should hold good according to the terms of the arrangement entered into between the parties. As the debtor failed to make good the money due, the decree-holder again applied for execution, but the Judge held that, as the case had been struck off the file, the whole of the previous acts done in execution had become inoperative; that the attachment had been removed, and, consequently, the decree-holder has to commence the process of execution *de novo* against the property of his debtor. The consequences to the decree-holder may be very serious, for, as soon as the attachment is removed, the debtor may dispose of his property to a third person, or, as priority of attachment gives the creditor, making the first attachment, a right to recover the whole amount of his debt from the proceeds of sale before any payment is made to other creditors, it becomes a matter of considerable importance to the creditor that his attachment should not be declared null and void. When an execution case is struck off for default, as happened in the cases quoted to us, we think that the whole of the proceedings taken in execution do determine and become of no avail to the creditor; and that in taking out further execution, he must commence his proceedings from the beginning. But when, as in the present case, the creditor, at the instance, and for the benefit, of the debtor, agrees to adjourn the sale of the debtor's property for a certain period to enable the debtor to meet his liabilities, on condition that the attachment of the property is to hold good, and the Court, merely with the view of keeping its files clear, strikes off the case, providing in its order for the continuance of the attachment of the property, it would be very unjust to the creditor, when he next applied for execution, to tell him that all the steps he had previously taken were null and void, and that no proclamation of sale could take place without a fresh attachment; that the effect of striking off the case, which was done, not because the decree-holder was not diligent, but for the convenience of the Court that its files of execution cases might be kept clear, was to render nugatory everything the creditor had hitherto done, and to set aside the agreement with his debtor upon the strength of which alone he had consented to the adjournment of sale. We think that execution cases in which a sale or other proceedings are stayed for a fixed period at the request of the debtor, and with the consent of the decree-holder, should not be struck off till the period mentioned therein has expired. And in the present case, looking to the order of the Court passed when it struck off the execution case, which distinctly provided for the continuance of the attachment, we think that the attachment is still good and valid; and under this view of the case, we reverse the order of the Judge with costs in both Courts.

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CASES 253 OF 1863 AND 1116 OF 1862.

Special Appeal from Rajshahye.

Mahomed Akil, (Defendant) *Appellant, versus* Asadun-nissa Bibee, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Bayley. Norman, Seton-Karr, L. S. Jackson,* and *Macpherson*, J J.

Mr. J. S. Rochfort, Moulvie Muhummut Hossein, and *Baboo Mohinee Mohun Roy* for Appellant.

Baboos Mohendro Lall Shome and *Mutty Lall Mookerjee* for Respondent.

Special Appeal from Sarun.

Mutty Lall Sen Gywal, (Defendant) *Appellant, versus* Desharkar Roy, (Plaintiff) *Respondent.*

Baboo Tarrucknauth Sen for Appellant.

Baboo Debendur Narain Bose for Respondent.

These cases were heard by a Full Bench of nine Judges in January, 1866. *The circumstances under which they were referred are fully set forth in the judgment of the Chief Justice. The first of the two cases was referred to a Full Bench under the following order recorded by L. S. Jackson and Campbell, J. J. :—*

This special appeal raises the question how far the grant for valuable consideration by a zemindar of a specific portion of land to be held without payment of rent is valid as against the heirs of the grantor or purchaser by private sale of the estate.

We observe that there has been some conflict of decision upon the point, and we are informed that in two very recent cases the learned Chief Justice and Mr. Justice Levinge have held one view, and Mr. Justice Norman and Mr. Justice Kemp another.

We ourselves entertain doubts upon the subject, and we think the matter ought to be decided by a Full Bench.

THE JUDGMENTS OF THE FULL BENCH WERE DELIVERED AS FOLLOW :—

Macpherson, J.—In these cases there are two questions to be decided. The one is whether a grant by a zemindar of a portion of his estate to be held free of rent is a grant void as against the grantor and those claiming under him; the other is whether a similar grant made by a mouroseedar is void as against the grantor and those claiming under him.

The lands which are the subject of discussion in the first of the two cases before us, were granted on the payment of sums of money to the grantor,—were in fact sold. Whether the lands were given for a valuable consideration or otherwise does not, however, as it appears to me, materially affect the questions the Court has to decide; for whether sold or given, the conclusions at which I arrive will be the same.

The contention on behalf of the respondents is that, under Section 10 of Regulation XIX of 1793, such grants are null and void, and the lands may at any time be resumed by the grantor or those holding under him.

I shall first consider the case of grants by a zemindar. It is admitted, and is beyond dispute, that, although by Regulation XLIV of 1793 (passed contemporaneously with Regulation XIX of that year) a zemindar could not make a valid lease for a period exceeding ten years, still he was not, by that or any other law, under any restriction whatever as to the amount to be reserved by him on any lease he might make. Whatever might be the amount of Government revenue payable by the zemindar, the lease, if not for a period in excess of the prescribed limit, would be valid, although but a nominal rent were reserved. By Regulation V of 1812, the restriction as to the length of lease was removed, and from that time (to which the grants now under consideration are subsequent) a zemindar or other proprietor of land was competent to grant leases for any period he pleased, and for any rent, whether nominal or not, which he pleased. It is argued that, although when the grants (the effect of

The question being whether a rent-free grant made for valuable consideration by a zemindar after 1st December, 1790, of lands included in and forming part of the mál lands of his permanently settled estate, can be set aside as void by the heirs of such zemindar or by a purchaser from him by private sale, on the ground that such lands do not pay their quota towards the Government revenue of the whole estate. *Held*, by the *Chief Justice*, and by *L. S. Jackson* and *Macpherson*, J. J., that such a grant could not be voided by the heirs of the grantor, nor by a private purchaser from him, though a purchaser at a sale for arrears of revenue might in most cases set it aside. (*Bayley, Norman*, and *Seton-Karr*, J. J., dissenting)

Held, nem. con., that the written opinions left in the Office of the Court by three of the Judges originally forming the Full Bench, who heard the case, but had ceased to be Judges of the Court before judgment was pronounced, could not be treated as judgments, but as mere minutes of opinion.

[*Note.*—The three minutes in question

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were all in favor of the view taken by the dissenting Judges.]

which the Court has now to determine) were made, the grantors might have given leases in perpetuity, and for a cowree or other nominal rent, which would have been valid and binding on their heirs and representatives, still the provisions of Section 10, Regulation XIX of 1793, are such that any gift or grant of any portion of the estate,—any absolute transfer of it,—whether for full valuable consideration or not, is invalid. It is said that the zemindar must always, when disposing of his lands, do so by way of lease, with a reservation of something, however small, in the way of rent, and that an absolute parting with his interest in any portion of his lands is void.

It appears to me that Section 10 of Regulation XIX is intended to apply to grants of land to be held exempt from the payment of Government revenue, and that the meaning of it is that, when any attempt is made to dispose of lands, so that they shall be held as against the Government free from Government revenue, such attempt shall fail. The whole object of Regulation XIX of 1793 is to secure the Government revenue. The title declares it to be a Regulation for trying the validity of the titles of persons claiming to hold lands exempt from the payment of "revenue to Government," and for determining the amount of the annual assessment to be imposed on lands liable to the payment of "public" revenue.

Section 1, the preamble, recites that, by the old law, the Government was entitled to a certain proportion of the produce of every beegah, and that, therefore, "if a zemindar made a grant of any part of his lands to be held exempt from the payment of revenue," it was void from being alienation "of the dues of Government," for otherwise if such grants were upheld, obviously revenue of Government would have been liable to gradual diminution. Further on, the Section recites that Government had declared void "all grants for holding land exempt from the payment of revenue" made without sanction since the Company's accession, but that the Government had recognised and upheld certain grants made prior to the accession; that many grants existed which were invalid in reality; "that, therefore, the Governor-General in Council deemed it is incumbent on him to 'recover the public dues thus alienated,' as well as to resume the revenues of all lands the grants for which might expire." It recites also that it had been enacted that the "jumma" assessed upon the estates of individuals was to be considered as exclusive of all existing "lakheraj" lands, "whether exempted from the lakheraj or 'public revenue,' with or without due authority," and that it was expressly stipulated in the Proclamation declaring the decennial settlement permanent, that the Governor-General in Council would impose such assessment as he might deem equitable on lands alienated "and 'paying no public revenue,'" and held under an invalid title. The preamble continues that the Governor-General desires that the claims of the public on these lands shall be tried in the Courts of Judicature, "that no such exempted lands may be subjected to the 'payment of revenue'" till the titles of the proprietors have been adjudicated upon. Upon these grounds (the Section concludes) and with a view to "to facilitate the recovery of the public dues" from lands held exempt under invalid grants, as well as to prevent any similar alienations being made thereafter "to the prejudice of the security of the public revenue," and further that the Government officers employed in the collection "of the public revenue" may have a correct register of lands exempt "from the payment of revenue," the rules contained in the subsequent Sections of the Regulation are enacted.

In this preamble I fail to see any indication of an intention to declare void grants of land free of rent payable to the zemindar. Throughout, it is the public revenue, and that alone which is kept in view; and reading the preamble by itself, I should not hesitate to say that the only alienations complained of, and which it was desired to check, were attempts on the part of the zemindars to alienate their estates so as to free them from the payment of "Government revenue," not alienations free from rent payable to the grantor himself.

It is argued that the recital of the Government right to a quota of the produce of each beegah shows that the Government, while enacting Regulation

XIX, considered that it was then entitled to a quota from each beegah. But the settlement was then made, and the Government in fact no longer had a right to more than the revenue reserved. The interest in each beegah of land, which the Government originally had, ceased with the settlement, save that each beegah belonging to the zemindaree remained charged with the whole revenue payable in respect of the zemindaree, the Government accepting in lieu thereof a fixed amount of revenue from the zemindar. I do not therefore consider that the mere fact of the Government having originally had a share of the produce of each beegah is sufficient to lead to the conclusion that the preamble of Regulation XIX is to be read as referring to grants of land free of rent to the zemindar, as well as to grants of lands free of revenue to Government. To take away from the zemindar the right to grant his lands free of rent to himself and those claiming under him, is such a restriction of, and detraction from, his rights, (given to him by Regulation I of 1793, Sections 9 and 10) that it must be done distinctly and undoubtedly; and the law, when questions arise as between the grantor and the grantee, is certainly to be construed rather in favor of the validity of such grants than against them.

As the preamble, so I think the enacting Sections of Regulation XIX, as well as the contemporaneous legislation of the Government, are all alike to be read as invalidating grants of lands free of revenue payable to Government, and not as invalidating grants free of rent to the zemindar.

I agree in much that is said by the late Mr. Justice Levinge in his judgment in the case of Peezaroodeen *versus* Modhoo Soodun Pal Chowdry (II Weekly Reporter, 26), and many of his arguments, which I shall not here repeat, seem to me to be very pertinent. As Mr. Justice Levinge remarks, "A grant of land 'rent-free' by a proprietor does not more interfere with the revenue of the Government, or the position of the proprietor, than a lease in perpetuity at a nominal rent of one rupee annually. This lease in perpetuity has just as much effect on the revenue (which is 'nothing') and on the income and resources of the zemindar, as a grant free of rent payable to the zemindar. Yet it is not disputed that the lease is binding on the zemindar and his heirs. But it is said the grant is not legal, because it is contrary to the Regulations and against the policy of the law, which will protect the zemindar from 'improvident' alienations, though made on good consideration."

As to any reference to what is supposed to be the "policy of the law," it is clear that all that we, sitting here, have to decide is what the law actually is. We can have nothing to do with any so-called "policy" other than such policy as to be found in the law itself.

The law was, in my opinion, correctly stated by Mr. Abercrombie Dick, one of the Judges of the late Sudder Court, in his judgment of the 18th of July, 1855, when he said:—"I concur with the Principal Sudder Ameen that the grant is not resumable by the heirs of the grantor, and that Section 10, Regulation XIX of 1793, does not apply to the case. The law could not intend to declare that the party who had made the grant could at pleasure resume it, whether given for valuable consideration or not, or intend to entitle the heirs of such grantor to resume. This would be authorizing such persons to repudiate their own acts and the acts of their ancestors. Grants of the nature in question, *quoad* the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue; and if he do not, the estate is sold, and then the grant becomes null and void. The law (Section 10, Regulation XIX of 1793) was enacted to prevent alienations prejudicial to the security of the public revenue, not to enable proprietors and their heirs (whose ancestors' acts are theirs) to profit by their own wrong. The proprietors and their successors, who are authorized to resume at pleasure, are not those who made the grants or their hereditary ancestors. An auction-purchaser can annul grants and alienations. This the law declares. All *bonâ fide* alienations are binding on those who made them and on their heirs. This justice requires, and our precedents have decided."

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Regulation XLIV of 1793 has been dwelt upon, showing that the intention of the Legislature must have been to render grants free of rent to the zemindar absolutely void. It is true that that Regulation recites the weakness or viciousness of the zemindars and their tendency to grant pottahs of their lands improvidently so as to diminish "the revenue of Government arising from the lands, in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the amount of the public demand upon their estates," and that it limited the period for which a lease could be granted to ten years. But Section 6 declares that nothing in the Regulation shall be construed to prohibit any zemindar, &c., from "selling, giving, or otherwise disposing" of any part of his lands as a "dependent" talook. And I cannot understand how the fact of the Government having thought it necessary to limit the length of leases to ten years, while it did not think it necessary to provide for the reservation of a rent proportionate to the Government revenue, or any substantial rent at all, can be said to afford any logical argument in favor of the respondents.

The position of the holders of grants declared void by Section 10 of Regulation XIX is considerably altered by Act X of 1859, and the suits now in appeal before us were instituted after Act X of 1859 came into force. Section 25 of that Act, while it leaves untouched so much of the old law as declares grants for holding land exempt from the payment of revenue null and void, repeals that portion of it by which proprietors, &c., were "authorized and required to collect the rents of such land, to dispossess the grantor and to annex the land to the estate in which it might be situate;" and declares that any proprietor, &c., who may desire to dispossess a grantee, &c., shall bring a suit before the Collector within twelve years from the time when the title of the person claiming the right to assess the land, or of some person claiming under him, first accrued. As the law now stands, there is merely a declaration that these grants are null and void, but no proprietor, &c., can, of his own authority, act on their being so; he must invoke the aid of the Revenue Courts. Whereas such grants were under the old law absolutely void, they now apparently are only voidable. And if they are only voidable, it may be doubted whether the grantor or those claiming through him will be permitted by the Courts to come forward in fraud of their own act and to set aside the grant.

Section 10 of Regulation XIX of 1798 expressly declares that "no length of possession shall be hereafter considered to give validity to any such grant." But it has been recently ruled by the Privy Council that, notwithstanding this declaration, sixty years' undisturbed possession under such a grant "does" give validity as against the heirs of the grantor. This was in the case of Chundrobullee Debia *versus* Lukhee Debia Chowdrain (V Weekly Reporter, 1 P. C. cases), in which suit a grant of land free of rent for the worship of an idol was sought to be set aside. The only point decided by the Privy Council is the one of limitation, and there is no decision of the general question of the right of the representative of a grantor to impeach the grant of his grantor.

On the whole, putting a reasonable construction upon Section 10, Regulation XIX of 1793, and ascertaining its meaning upon the principles indicated by their lordships of the Privy Council in the case of Ranee Shurno Moyee *versus* Moharajah Sutesh Chunder Roy (II Weekly Reporter, 14 P. C. cases), I am of opinion that when a zemindar has granted a portion of his land free from rent, such grant cannot be set aside or rendered void by the grantor or those claiming through him. Lands granted by a zemindar, whether he reserves any rent or not, must of course always remain liable for the Government revenue due in respect of the zemindaree of which at the time of the grant they form part; but, as against the grantor and those claiming through him, the lands will belong to the grantee free of rent payable to the zemindar, so long as the grant is not set aside by Government.

The position of a grantee from a mouroseedar may perhaps be stronger than that of a grantee from a zemindar. It certainly cannot be weaker, and therefore it is unnecessary for me to go further into that question; for in holding that such a grant is good against the zemindar who made it, and those

claiming through him, I necessarily also hold that such a grant, when made by a mouroseedar, is good against him and those claiming through him.

As regards the written minutes or memoranda, in the nature of judgments, which have at various times been put into the hands of the Registrar of the Court by Mr. Justice Trevor, Mr. Justice Campbell, and the late Mr. Justice Shumbhoonath Pundit (who sat on the Bench when these appeals were argued, but who are none of them now members of the Court), I have no sort of doubt that not one of these three minutes or memoranda can be treated as a judgment. I agree with the learned Chief Justice in the opinion which he has formed upon this question, and generally in the reasons upon which that opinion is founded.

Jackson, J.—The first question which we have to determine is that which has been adverted to by the Chief Justice, and which has also been specified in the notice that judgment would be delivered this morning, that is, whether the minutes written by three Judges of this Court, who have retired or are no longer members of the Court, should be looked on as judgments, and should therefore influence the decision to be given in these appeals.

The Chief Justice has gone very fully into this point, and in the opinion which he has expressed, I believe all my learned colleagues have concurred, subject to such arguments as might be advanced this morning. I myself should have been inclined to go further and to regard that point as not open to argument.

It has been suggested that it was the practice of the late Sudder Court, and is still to some extent the practice of the High Court, to hand into the office written judgments, instead of pronouncing them in open Court. If such was the practice of the late Sudder Court, I can only say that it was in direct contravention of the provisions of Section 359 of the Code of Civil Procedure. That Section declares that the judgment of the Appellate Court is to be "pronounced in open Court;" and it proceeds to lay down what is to be contained in the judgment, and in what language it should be delivered. If, therefore, a judgment, instead of being pronounced in open Court, was handed into the office, it must only have been by a species of fiction that the judgment so handed in was to be regarded as read by the Judges, they being present in Court on the day when it was put in, and able to read it if they had been so minded; and I am not aware of any instance in which a judgment or opinion written by a deceased Judge, or by a Judge who had left the Court, was treated as a valid judgment.

The Section I have quoted, it is true, does not apply to the High Court, because it is one of the Sections which, by Section 5, Act XVIII of 1862, is declared not to apply to the High Court. I have, however, always understood that it was necessary in strict practice that judgments should be delivered and pronounced in open Court. Clearly, we are met to-day for the first and only time to give judgment in these appeals; and it appears to me, beyond question, that Judges who have died or have retired from the Court cannot join in the judgment which is to be delivered to-day, and express their dissent from it. I myself would therefore exclude argument on this point; but as opportunity has been afforded to the pleaders to argue it, and none has been offered, I have therefore only to add that I concur entirely in the view which has been expressed by the Chief Justice on this point upon general principles.

Having had the opportunity of reading the judgment in these cases prepared by the Chief Justice, and being able very generally to adopt the conclusions and the reasons set forth in that judgment, so far as they bear upon the provisions of law referred to, and the cases cited before us, I consider that I am relieved from the necessity of going at such length as would be otherwise requisite into the considerations which lead me to an opinion in favor of the tenant and against the right to resume.

Nevertheless, I shall endeavour to state, as briefly as possible, those parts of the case on which I have long since arrived at an independent conclusion, and on which the view I have originally formed has been in no degree shaken

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either by arguments at the bar, or by the reasons which have weighed with my learned colleagues who are of the contrary opinion.

The right for which the zemindar or the middleman contends in these cases is the right to take out of the hands of a grantee or his representatives lands given by the person under whom the plaintiff claims to be held free from the payment of rent to the grantor and his heirs or assigns, whether such grant has been made for an adequate or inadequate consideration, or without any consideration at all in money.

In neither case has the plaintiff offered, or the Court below compelled, re-payment of the purchase-money or compensation of any kind, and indeed the plaintiff is represented as proceeding, not merely on his rights, but also upon duty to the State, as being "required" by law to advance a claim which is not the less imperative on him, because it happens to be to his advantage.

To any person who considers the subject originally, it must be startling to find that the Courts of Justice could be asked, and yet more that they are found to sanction, demands of such manifest iniquity, and I am quite confident that none of my learned brethren who heard this appeal would have entertained the suit, unless compelled by the strongest pressure of positive legal enactment.

It is clearly not on the policy of the revenue laws that the plaintiff can rely. Courts of law, it seems to me, have no concern with that abstraction. They have to administer either the specific rules of positive legislation, or those general principles of jurisprudence which govern the tribunals of all civilized countries.

And in these cases accordingly the plaintiff's right is based on Section 10, Regulation XIX of 1793, which, as modified by Section 28, Act X of 1859, is said to enable the landlord to dispossess such grantees by a civil suit or by summary proceedings before the Collector.

If those provisions of law can be applied to such cases, and if the plaintiff can maintain his suit, it may be necessary to consider upon what terms the Court should allow him to undo that which he or his ancestor has done in the face of an enactment to which he, as well as the defendant, was then, as now, under the obligation to conform.

Is then the defendant a person setting up "a grant to hold land exempt from the payment of revenue, whom the proprietor of the estate is bound, in collecting the rents from such land, to dispossess (as grantee) of the proprietary right in the land, and to re-annex it to the estate?"

Does the defendant claim to hold his land free from the payment of revenue? Is he in the enjoyment of any proprietary right? and has the land ever been separated from the estate in which it is situate?

I apply those tests in the language of Section 10, Regulation XIX, because I do not understand that Section 28, Act X of 1859, makes any alteration in the relative rights of zemindar and grantee, or affects the principle on which a grant would be void, but only that it takes away the power which the zemindar had of acting by his own right hand, and compels him to resort to the Collector or the Civil Court.

It is admitted that the first of these questions must be answered in the negative, unless it be considered that the framers of Regulation XIX of 1793 (and it may be those also of Act X of 1859) said "revenue" when they meant to say "rent."

Section 14, Regulation XLI of 1793.

I think the Chief Justice has sufficiently cleared the Legislature of 1793 from the charge of having either (contrary to its own expressed intentions) used the same words in two different senses, or employed two really distinct terms to denote the same description of thing. We may give a similar credit to the authors of Act X of 1859, and I think it needless to argue that question further.

On the second question, it seems to me quite clear that the defendant makes no claim to a proprietary right in the sense in which that term is understood by the Courts in India, and used in the Regulations of 1793.

If he did, he would be situated, in respect to the land comprised in his grant, precisely as the zemindar himself with respect to the zemindar of the original estate, and would be entitled to a butwarrah; but this could not be unless the proprietor conveyed to him out-and-out the whole of his rights, and sold the land as a portion of the estate, which indeed he would be fully competent to do either by way of dependent talook under Section 6, Regulation XLIV of 1793, or in absolute ownership, under Section 9, Regulation I of the same year. But the landlord did nothing of the kind; he merely conferred a right to hold the land free of rent to the proprietor, which grant, if not invalid by law, would bind the grantee, his heirs, and representatives.

Then, was the land dissevered from the estate? Most clearly not. It is admitted that the grant under consideration, if it be valid, binds only those who take under the grantor, and would be wholly inoperative as against a purchaser at a sale for arrears of Government revenue. But if so, the land has never ceased to be a part of the estate, and cannot be re-annexed to that from which it has not been severed.

It seems to me, therefore, abundantly clear that the grant impugned is not in any sense invalid under the terms of Section 10, Regulation XIX of 1793.

If arguments in support of this view, and external to that provision of law, be required, I think a most convincing one is to be found in the enactment* afterwards repealed by Regulation V of 1812, which restricted the term of leases to be granted by proprietors to ten years; this rule being expressly framed to counteract the occasional improvidence of zemindars.

* Section 2, Regulation XLIV of 1793.

To say that the Legislature permitted at first for ten years, and afterwards without restriction, leases in which a peppercorn rent was reserved, subject of course always to the operation of the sale laws, and that they indirectly forbid the grant to hold free of rent to the proprietor subject to the same contingency is, in my opinion, to impute to the Government of that time an infirmity of purpose and an inconsistency of which we find no trace in its other legislative measures, and of which it is unjust to suppose them capable.

It seems to me quite restrictive enough upon transactions relating to land that bargains made with a proprietor for the time being are liable to be set aside in favor of an auction-purchaser under Act XI of 1859, if the lease or grant be not among the kind which are especially protected by the exceptions contained in Section 37.

The fourth exception protects leases of lands whereon permanent buildings have been erected, or gardens, tanks, &c., have been made, but enables the landlord in certain cases to enhance; it gives no protection to leases in which the landlord may have reserved a trifling rent, receiving a larger sum of money to enable him to build factories, or make tanks or other works elsewhere for the benefit of the estate.

And there may be sufficient reason for not allowing such questions to become the subject of decision by the Civil Court. This restriction, whether reasonable or not, is quite sufficiently burthensome, without further enabling zemindars, out of a superstitious regard for the laws, to set aside their own acts, violate their own or their ancestors' contracts, resume what they have given, retaining at the same time that which they received in exchange.

But it is said that this grant is invalid for another reason, namely, that the State has an inalienable right to a portion of the produce of every beegah of land in the country which is not expressly exempted under some valid title, and that consequently every grant which relieves a portion of land from the burthen which it ought to bear, is in contravention of the common law of the empire, and ought to be set aside.

This argument, in my opinion, involves a very distinct and very serious fallacy.

No doubt "by the ancient law of the country," as set forth in the well-known preamble to Regulation XIX of 1793, "the ruling power was entitled

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to a certain proportion of the produce of every beegah of land," subject, however, to this important reservation, "unless it transfers its right thereto for a time or in perpetuity, or limits the public demand upon the whole of the lands belonging to one individual, leaving him to appropriate to his own use the difference between the value of such produce and the sum payable to the public, whilst he continues to discharge the latter."

Can any one doubt that, in cases of estates permanently settled, the State has given up in perpetuity its right to a "certain proportion of the produce of every beegah," and has agreed to receive a sum commuted in satisfaction of the public demand upon the whole of each permanently-settled estate? or that the difference between the value of such proportion of the produce and the sum payable to the public, is the absolute property of the zemindar so long as he continues to discharge the latter. And is the zemindar less than other owners free to do what he will with his own? In other words, is not the zemindar, as long as he continues proprietor and pays the Government revenue assessed on his estates, absolute owner of the rents, being at liberty to collect or not, to enhance, (if the nature of the tenure permit) or to abate to collect by his own servants, to farm out the rents, to commute the payment, or to bind himself not to require any?

But, for the security of the public revenue, it is a part of the law of the country that, with certain exceptions, the purchaser of an entire estate in the permanently-settled districts, sold under the sale law, acquires it free from all incumbrances which may have been imposed upon it after the time of settlement.

In this positive provision of law, it seems to me, and not in any theoretical rights of the estate, does the safety of the public revenue and the security of the purchaser consist.

But, moreover, if any such principle existed, and the public revenue were at all endangered by such grants, who would be the party entitled to complain and to avoid the grant?

Surely not the person who had himself created it, who had benefited himself while he endamaged or imperilled the interests of the State.

I could conceive such an action as this brought by the Collector *ne quid detrimenti res publica capiat.*

I could also, by an exertion of the fancy, imagine a case of such a grant made in ignorance of the law on both sides, and a proposal by the zemindar to set aside the contract and make mutual restitution; but to entertain a suit by the zemindar to replace him *in statu quo*, while the grantee remained in neither one state nor the other, to decree a one-sided observance of the law, and not compel the landlord to restore that which *he* took under an illegal contract, this, I think, would be something like an abetment of fraud, which I should be sorry to require from any inferior Court in Her Majesty's dominions.

For these reasons therefore, chiefly, I am of the same opinion with the Chief Justice, and in saying so I feel that if one is safe in being on the same side with a profound and careful study of the law relating to the subject under consideration, I have that security in the present case.

I also refer, with particular satisfaction, to the case cited from VI Select Reports, page 281, and that from the Sudder Dewanny Reports for 1852, page 967.

I would answer the question put by the Division Bench in the affirmative, and would therefore reverse the decisions of the Courts below with costs.

Such arguments as I have employed are addressed to the case of a grant by the zemindar himself, and the case of a grant by a mouroseedar or other middleman is, of course, even stronger in favor of the grantee.

Seton-Karr, J.—This case was argued on the 16th, 17th, and 18th of January, 1866, before a Bench of nine Judges. After hearing full arguments of Counsel, and discussing the matter with several of my colleagues, I formed conclusions which I recorded on the 12th of March, 1866; and from those conclusions I have not, after further and more mature consideration, seen any reasons to depart.

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The question which we have to consider in this case is whether a grant for valuable consideration by a zemindar of a specific portion of land to be held without payment of rent is valid against the heirs of the grantor or against a subsequent purchaser by private sale.

This question, simple as it is, appears to me to involve a consideration of the whole policy of the Revenue laws regarding the burden imposed on land on behalf of the State, and the creation of the rent-free tenures subsequent to the permanent settlement, quite as much as it involves any rights or privileges conceded to the zemindars of Bengal by that great measure.

In the course of the argument which lasted three days, the authorities, laws, and cases noted in the margin were referred to.

Authorities.
Shore's Minute, 18th of June, 1789, paragraph 218
Fifth Report of the House of Commons.
Colebrooke's Supplement, page 239.
Harington's Analysis, Volume II, page 58, edition of 1814-15.
Laws.
Old Regulations, 1780-88-90, Sections 4 and 5.
Regulation III of 1793, Section 1.
" XIX of 1793, Section 10.
" XLIV of 1793, Sections 6 & 7.
" VIII of 1800.
" II of 1819, Section 30, Clauses 1 and 2.
Act X of 1859, Section 28.
Cases.
Sudder Dewanny Adawlut, January 28th, 1840, Volume VI.
Sudder Dewanny Adawlut, 1847, Volume VII, page 384.
Sudder Dewanny Adawlut, 1852, page 967.
Sudder Dewanny Adawlut, 1853, page 968.
Sudder Dewanny Adawlut, 1855, 18th July.
Sevestre's Reports, Volume VIII, part 3.
High Court, 28th April, 1863, No. 303 of 1862. (*Norman* and *Kemp*, J. J.)
Weekly Reporter, January 9th, 1865, Full Bench Decision.

The cases referred to us by the Divisional Bench in this instance comprise several grants. Grant No. 2 is for a tank excavated for the convenience of men and of cattle; and it appears to me that this grant ought to be governed by the decision of the majority of the Full Bench of the 9th of January, 1865, and that it must hold good against the heirs and successors of the grantor, or against any purchasers, save the purchaser at a sale for arrears of public revenue.

The other grants numbered 1, 6, 7, 8, 9, 10, and 11, were all made for no particular purpose, and for considerations of rupees 200, rupees 100, and other sums. Some of the grants are of very small extent, being of a few beegahs, but the greater or less size of the grant can hardly enter into our consideration. The real point at issue is whether grants, made rent-free for land of any extent after the perpetual settlement, can or cannot be voided by the heirs of the grantor. The case of a purchaser at a public sale for arrears of revenue is not before us, nor is it raised in these cases in any way. It is quite clear to me that, as against such a purchaser, such grants would be utterly void, and I do not gather that any doubt is anywhere entertained on this point.

The Lower Courts, relying on the late Sudder Court's decision of the 8th July, 1855, have decreed the plaintiff's claim for resumption, and have declared the land liable to assessment. This is the result in both the cases, Nos. 253 of 1863, and 1116 of 1862, referred to us. The great contention raised before us is the intent and meaning of Regulation XIX of 1793, and especially of Section 10 of that Regulation, as well as the meaning of the word "revenue" used in that law, and in several other enactments.

After much consideration I am driven to the conclusion that the word "revenue" at that time was not invariably employed to mean only the revenue demandable by Government, but that it also practically comprised the rent receivable by the zemindar who was accountable for the revenue. No doubt, in some of the Sections of that law and in the preamble, the term "revenue" is employed with special reference to the demands of Government; but Section 10, which refers to grants made after the 1st of December, 1790, appears to me to have little or no practical force if the term "revenue" be confined or restricted to the demand on account of Government.

The difficulty that I feel in restricting the term "revenue" to the Government demand only arises in some measure from the consideration that, after

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1790, it was not very likely that persons should take on themselves to exempt any lands from the payment of revenue strictly so called.

Further, rents were practically the source and nucleus of revenue. I admit that the exact meaning to be applied to this term is the source of perplexity, and that I had at times had some doubts on the subject; but, on the whole, I am now come to the conclusion that "revenue" in Section 10 was intended to include, and in litigation did include, the rents or the collections made by the zemindars from the ryots. Alienations of what the natives would term "kharij" or land dues were, by that Section, declared absolutely null and void if made by any one, or on any account, after December, 1790. This view is, to my thinking, strongly confirmed by the preamble to Regulation XLIV of 1793, in which the "rent or revenue reserved by proprietors" is used apparently to designate one and the same thing. As the preamble of this Regulation is important, as showing the views of the Government of the day in regard to the powers of zemindars under the permanent settlement, I here set it out at length:—

"The public demand upon the estates of the proprietors of lands with whom a settlement has been or may be concluded under the original Regulations for the decennial settlement having been declared fixed for ever, it is to be apprehended that many proprietors, either from improvidence, ignorance, or with a view to raise money, or from other causes or motives, may be induced to dispose of dependant talooks to be held at a reduced jumma, or fix the jumma of such dependant talooks as now exist, in their respective estates, at an under-rate, or let lands in farm, or grant pottahs for the cultivation of land at a reduced rent for a long term or in perpetuity. Such engagements, if held valid, would leave it in the power of weak, improvident, or ill-disposed proprietors to render their property of little or no value to their heirs; promote vice and injustice; occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the amount of the public demand upon their estates; be an abuse of the great and lasting benefit which has been conferred upon the landholders by the possession of their lands being secured to them in perpetuity at a fixed assessment; and, moreover, be repugnant to the ancient and established usages of the country, according to which the dues of Government from the lands (which consist of a certain proportion of the annual produce of every beegah of land demandable, according to the local custum, in money or kind, unless Government has transferred its right to such proportion to individuals for a term or in perpetuity, or fixed the public demand upon the whole estate of a proprietor of land, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, so long as he continues to discharge the latter) are unalienable without its express sanction. It is, at the same time, essential that proprietors of land should have a discretionary power to fix the revenue payable by their dependant talookdars and to grant leases, or fix the rents of their lands for a term sufficient to induce their dependent talookdars, under-farmers, and ryots to extend and improve the cultivation of their lands, and that such engagements should be held inviolable in all cases, except where they may interfere with, or affect in any shape, the primary and indefeasible rights of Government." These are very weighty and significant words, and I contend that they strongly support the views which I have expressed above. This view also seems to be confirmed by the following passage from Harington's Analysis, Volume II, page 58. In alluding to the report of Messrs. Anderson, Croft, and Bogle of 25th of March, 1778, the author says:—"It is not perfectly accurate, especially in the indefinite use of the term 'rent' as sometimes denoting the return or compensation for the occupancy of land paid by the immediate occupant or tenant to a superior landholder or his representative, and at other times signifying the 'public land revenue' payable to Government." The same contention is further countenanced by the language of the old Regulation, anterior to the Code of 1793, of the 1st of

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December, 1790, and by Colebrooke's Supplement to the Digest of the Regulations.

That this view, right or wrong, has had a practical effect given to it, can, I submit, hardly be denied. For, if the language of the first lines of Section 10 of Regulation XIX of the same year 1793 could not have been held to refer to or include rents, it is not very easy to see under what law or Regulation zemindars could resume and re-annex, as they have done, grants of rent-free lands improperly set up or created after 1790. No one, as I have already observed, was very likely to alienate revenue, properly so called, after 1790; and looking to rents as the basis and foundation of revenue, I must conclude that this Section has been applied so as to allow zemindars to resume grants made free of rent after a certain date, and thus to draw from every part of their estates a proper contribution to the fixed portion of revenue which they were bound to pay in to Government. This is really the construction which has been put on this Section by our Legislators and our Courts for years. Possibly, the language of the law has not been very critically examined and tested at any time; but I think it will scarcely be denied that this is the one law to which all zemindars were accustomed to look for series of years as empowering them off-hand to re-annex lands which any one claimed to hold rent-free, and that this was the the view taken of the language of the Regulation by those who framed and passed Act X, and who, in rescinding Section 10 of Regulation XIX of 1793, and in passing instead Section 28 of the new law, clearly and unmistakably treated the enactment as the one by which zemindars were entitled to dispossess alleged grantees and to assess their invalid grants with the proper amount of rent. In fact, if we exclude these laws, or treat them as exclusively applicable to the Government revenue, and not to rent, it is not easy to see to what part of any Code zemindars could resort to claim their rights against parties who set up invalid and unauthorized rent-free titles on their estates.

What again, I may ask, is the construction which has been put on that well-known Regulation II of 1819, Section 30? Have all zemindars, all the Courts, all authorities, been wrong in allowing suits, not merely against, but by zemindars, to be instituted under that Section for the resumption of rent-free grants for a long series of years?

The first Clause of that Section is as follows:—"All suits preferred in a Court of Judicature by proprietors, farmers, or talookdars, to the revenue of any land held free of assessment, as well as all suits so preferred by individuals claiming to hold lands exempt from revenue, shall, immediately on their institution, be referred for investigation to the Collector or other officer exercising the powers of Collector; provided also that proprietors, farmers, or talookdars, who may deem themselves entitled to the revenue of any land held free of assessment in their respective estates, talooks, or farms, or individuals claiming as aforesaid to hold lands free of assessment, shall be at liberty to prefer their claims in the first instance to the Collector; provided, further, that the party so preferring his claim directly to the Collector shall, in his petition to the Collector, state the particulars of his claim, and the grounds on which it is founded, in like manner as if the suit were instituted in a Court of Judicature; and the petition shall be written on stamped paper of the value prescribed for petitions of plaint in suits instituted in those Courts."

It is impossible to deny that, whether the language of the laws has been correctly interpreted or not, the interpretation has been that suits to avoid rent-free grants can be brought under it. This view has been acted on practically all over the Lower and Upper Provinces for a long series of years. And it seems to me too late now to set a different meaning to that which has had the seal of suitors and pleaders of Courts and Judges for more than fifty years. It may, in fact, be said that the zemindar has been regarded as the transferee of the rights of Government; and, under the term "revenue" mentioned in the Regulations, he has been allowed to claim his "rents", of which all land revenue is made up.

The next point, and an equally important point in this reference, is the

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policy of the Revenue law. It appears to me wholly impossible, and indeed unjust, to discard a consideration of this policy if we can discover it. And on this point, I have arrived at this conclusion that the deliberate policy of our whole revenue legislation has been against the creation of any such grants. The law so much quoted, Section 10, is clear against the alienation of revenue for such purposes. But even if it could be contended that rents are not included in the term "revenue," the general policy of the state on this subject can be collected from other enactments; and to my mind, it is impossible to treat this question fairly without considering that policy. Landholders, by Regulation XLIV of 1793, Section 2, were prohibited from making leases or engagements with their under-tenants or ryots for a term exceeding ten years; and this marked restriction was not removed until the year 1812. The whole theory of the revenue in Bengal and, I understand, in Upper India, is that a certain proportion of the annual produce of every beegah of land is due to the State; and if this be admitted, as it must be on all hands, then how can the zemindar deprive his heirs of the right to receive portions of produce from any distinct portion of land, or number of beeghas, without at the same time theoretically, and if the grants be of any size in positive practice, imperilling the realization of the dues of Government which are made up of such produce?

The early writers on revenue, such as Shore, Harington, and others, support this view. The decisions of the Judges of the late Sudder Court, with the exception of that of Mr. A. Dick, who dissented from the judgment of the 18th of July, 1855, seem to me to take up and to act on this view of the law, though the decisions are not very numerous.

The decision of our Full Bench of January 9th, 1865, does not finally "rule" more than that water is in the nature of the rent which the zemindar might receive from a tract otherwise barren and profitless. Water, obviously, is essential to the well-being, and even to the very existence of the population, and the tank in that case was in several ways a benefit to the land and a return to the zemindar.

It may be said, on the other hand, that there is no difference, practically, as regards the security of the public revenue, between leases at pepper-corn rents which any zemindar may legally create, and rent-free grants which, in this view, he may not create. But looking to possible and probable results, there is a difference, and a somewhat substantial difference. In the case of land leased at however low a rent, some record of the same must still be kept in the zemindaree papers. The rent, if it were only one rupee for a large village, would still be collected, and traces would be found of the tenant who paid the rent. Land held absolutely rent-free is at once severed from the estate. All connection between the two would cease, and in a few years all traces of the origin, size, and details of the grant might entirely pass away, or be only in the power of the grantee.

Lastly, it is a question whether, if the rent-free grant could not be created by a zemindar, it might be created by a mourosee talookdar, such as we have in the case before us, and be of force. In my opinion, we should not be justified in making any distinction between the two. If the zemindar cannot be permitted to imperil the security of the revenue, or to thwart the policy of the estate by such creations, neither can a subordinate or under-tenant. In the event of a sale for arrears of revenue, the assets of the land which make up first rent, and ultimately revenue, might equally be frittered away or diminished, and the rights of Government might be equally injured, whether the alienation had been made by a subordinate tenant, or by the superior landholder. The burden of the revenue falls on the land, and the law has laid it down that the land must not be cut down or impaired so at to become unable to meet this burden. If the zemindar cannot bind his heir in this way, neither ought any subordinate holder, whether of the putneedar class, or of that of mouroseedars and others.

Section 28 of Act X of 1859 has not altered the policy of the law. It has only changed the mode of procedure to which zemindars must resort. The

alienations are still voidable by legal process, if any proprietor or farmer desires to avoid them. The only difference between this law and that of 1793 is that the grants are not, in the later law, declared at once "null and void."

It is no argument, to my mind, to say that there is at present little danger of these alienations becoming general, and that liberal zemindars are not so easily found, at this period of our social history to make presents of land to be held rent-free to venerable Brahmins, impoverished retainers, or respectable individuals, whose fortunes and condition are dilapidated and impaired. This is a consideration for the Legislature if it chooses to change its policy.

The settlement of Lord Cornwallis was a wise and liberal measure, and in some points of view it deserves all the praise that has been lavished on it. But it must not be forgotten that, though the Legislature in express terms then declared the zemindars to be "the proprietors of the soil," their property so declared was somewhat essentially different from the real property of an English Squire, with which we are familiar in England. The rights of ryots were, even in 1793, guaranteed and secured; valuable under-tenures were recognised, and were made the subject of special legislation; and a positive restriction was laid on zemindars, as already pointed out, whereby their power of granting leases was limited to ten years. A disregard of these fundamental distinctions, a neglect to consider the policy of Lord Cornwallis as it affected first the State, next the zemindar, and lastly the ryot, and a desire to apply the English law of real property to zemindaries in Bengal, would lead, in my opinion, to the most grievous confusion and to the most mischievous errors. If it be admitted that the Legislature of Lord Cornwallis prohibited zemindars expressly from making improvident leases, from creating under-tenures at a reduced rent or in perpetuity, and from permanently diminishing the resources of the Government, (Regulation XLIV of 1793) is it, in the smallest degree, probable that the Legislature of that day would have quietly looked on, while zemindars so confined, so restricted, so tied down, so patriarchally dealt with, were making rent-free grants in all directions, and were thereby lessening the productive area of their estates?

It seems to me no reflection on the excellent Cornwallis policy to say that such proceedings could never have had its sanction or contemplation All questions, therefore, which might otherwise arise as to the injustice or impropriety of the repudiation of the grantor's acts or agreements by his heirs or assignees, must be considered with, and be controlled by, considerations of public policy. And the arguments on this head in favor of the obvious justice of recognising such grants do not, in my opinion, apply to the case.

For let us for a moment consider what the results of permitting these alienations might be.

Hitherto no hardship whatever has been inflicted on any one. Men who purchase rent-free grants, old or new, are perfectly well aware that all such grants have been treated hitherto with marked disfavor, and that the holders of them are liable to be called on at any moment to prove their title. They buy them, therefore, with all the chances of having to prove the origin of their title, and, until the celebrated ruling in Khelat Chundra Ghose's case, two years ago, of having to prove it under difficulties which lapse of time only strengthened and increased.

But they are now to be told that, though old titles may be annihilated by the landlord suing in the Courts, new grants are to be recognised, and are absolutely binding on unwilling heirs and successors. Would not such a ruling give rise to endless attempts to create rent-free grants ostensibly in favor of deserving individuals, but in reality in favor of the zemindar himself? We all know the temptation to fraud and collusion held out by the "benamee" system unhappily so prevalent. And it appears to me, judging from past experience, that a ruling of this kind will only foster this spirit still more, and that private purchasers might at some future day find an estate so stripped and denuded of its assets, that in despair they would have no resource but to allow it go to the Collector's sale. It is true that in such a case the grants would no longer be

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binding on the purchaser, but the purchaser would have much difficulty in tracing out the origin of these alienations, and in replacing himself in the position of the Government, as he would have an undoubted right to do. And it surely cannot be right to encourage such public sales for arrears of revenue. Yet it is to such a consummation that this practice, if recognised and generally acted on, would assuredly tend; for there would be no other way of avoiding these grants if, as between private vendor and purchaser, and ancestor and heir, they were upheld by the Court. I cannot conceive, in the present state and feelings of native society, that such permission would be widely used for really beneficent and praiseworthy purposes. I can easily conceive, on the other hand, scores of cases in which it would be used only for purposes of selfishness and fraud.

If rent-free alienations at this day are desirable, and are to become general, let the Legislature declare this by a new Act. If grants are required by any liberal and large-minded individuals for a special purpose, such as a people's park, let a private Bill be introduced for that purpose in each case.

We have to administer, however, the law as it stands; and looking to the language of the Statutes, to the broad policy of the whole perpetual settlement as it affects Government as well as the zemindars, to the general course of the decisions of the late Sudder Court, to the avowed and recognized treatment of this very question hitherto by the parties most interested in it, and to the proble confusion and evil consequences of new rent-free creations, I have no doubt now left that, though a zemindar for himself may decline to take rents from any one for his own lifetime, we ought to return to the Divisional Bench our answer to the effect that a new purchaser, public or private, is not bound by any such grants or remissions, whether made from motives of real benevolence, or from mere carelessness and neglect of interests.

The above is my written judgment on the main question; but I came here to-day hoping to hear some arguments as to the propriety or otherwise of admitting the three opinions which have been delivered by our colleagues, one of whom, unfortunately, has been removed by death, while the other two have retired from the Bench; and I should have been glad to have heard what could have been advanced on either side on the question as to the propriety or impropriety of regarding the opinions of my late colleagues as mere opinions; of looking on them, either as final and conclusive judgments on the one hand, or as mere indications on the other, of what turn their opinions in all probability would have taken.

I conferred with two, if not with all three, of my late colleagues, and certainly, as far as I can recollect, they appeared to have fully made up their minds on a subject which they had very seriously considered, and on which they had had abundant opportunities of forming a final determination. I am however not prepared to say that they might not, on further consideration, have changed their opinions by the forcible arguments set forth by the Chief Justice and by others of my colleagues on the other side on this important subject, on which it is quite clear that we hold divergent and absolutely irreconcilable opinions.

This, therefore, is one reason why I am disinclined to treat the opinions of my late colleagues as final. But there is another reason I have had the advantage of reading what the Chief Justice has written, and I have conferred with some of my colleagues on the judicial practice of the highest and most authoritative tribunals elsewhere.

There appears to be some uncertainty as to the practice of delivering judgments by the several Division Benches. By some Benches, all judgments are delivered orally; by others, they are sometimes pronounced orally, and sometimes not; and by others again, they are always put in on a stated day by the Judges forming each Bench, without being read out at length in Court; while the counsel and pleaders are briefly informed of the determination which has been finally come to on the various points in issue.

But, on the whole, I cannot think that in a case which has been argued

before more than five, and in this case before nine, Judges, it would be right or seemly that one Judge should put in his own judgment without at least having read the judgments, or ascertained the opinions, of their brethren who sat with them on the Bench.

No instance where this practice has been deliberately countenanced has been brought to our notice; and looking to the undoubted practice of the Highest Courts in England evinced in two or three celebrated instances of late, and to the propriety and the seemliness of judicial proceedings, I own with some regret that I am under the necessity of stating that, in my opinion, the minutes of my late colleagues are not judgments, and that they cannot, and ought not to, be so treated.

I believe I am stating the unanimous opinion of the Bench; but I have thought it necessary to give, as concisely as I could, my reasons for concurring with my colleagues on this point.

Norman, J.—These cases were submitted by Division Benches in order to raise the question whether grants for valuable consideration by zemindars, of specific portions of land, to be held rent-free and without payment of revenue, are valid as against the heirs of the grantor or purchasers of the zemindaree by private sale.

I am of opinion that the question must be answered in the negative.

Counsel were heard on the 16th, 17th, and 18th of January, 1867.

Shortly after the argument, the Judges met to debate the question amongst themselves, and immediately afterwards, *viz.*, on the 9th of March, 1866, I wrote a judgment and sent it to the Office of the Court. Five other Judges sent in their judgments at different dates. Of the Judges who so sent in their judgments, one is dead, and two have left the Court. Speaking for myself, my judgment was intended for the perusal and consideration of my colleagues; and if any one of them had suggested any modification of it, I should have been prepared to discuss the matter, and alter or add to it, or strike out parts of it, if, on further consideration, it seemed proper or desirable to do so. The paper in that state was, in fact, a deliberative minute, rather than a judgment.

I concur with the Chief Justice in thinking that the papers sent in by Mr. Justice Trevor, Mr. Justice Shumbhoonath Pundit, and Mr. Justice Campbell, cannot be treated as judgments.

The question submitted for our opinion turns on the construction of Section 10, Regulation XIX of 1793. By Regulation I of 1793, Section 1, certain Articles of the Proclamation relating to the limitation of the public demand upon the lands, addressed by the Governor-General to the zemindars, independent talookdars, and other actual proprietors of land paying revenue to Government in the Provinces of Bengal, Behar, and Orissa, were enacted into a Regulation, which was to have force and effect from the 22nd of March, 1793, the date of the Proclamation. Article I is as follows:—

"In the original Regulations for the decennial settlement of the public revenues of Bengal, Behar, and Orissa, it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the jumma assessed upon their lands under those Regulations would be continued after the expiration of ten years, and remain unalterable for ever, provided such continuance should meet with the approbation of the Honorable Court of Directors for the affairs of the East India Company, and not otherwise."

Article II.—"The Marquis Cornwallis, the Governor-General in Council, now notifies to all zemindars, independent talookdars, and actual proprietors of land paying revenue to Government in the Provinces of Bengal, Behar, and Orissa, that he has been empowered by the Honorable Court of Directors for the affairs of the East India Company to declare the jumma which has been, or may be, assessed upon their lands under the Regulations above mentioned, fixed for ever.

Article III:—"The Governor-General in Council accordingly declares to the zemindars, independent talookdars, and other actual proprietors of land, with or on behalf of whom a settlement has been concluded under the Regula-

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tions above mentioned, that at the expiration of the time of the settlement, no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever."

Article VIII :—"That no doubt may be entertained whether proprietors of land are entitled, under the existing Regulations, to dispose of their estates without the previous sanction of Government, the Governor-General in Council notifies to the zemindars, independent talookdars, and other actual proprietors of land, that they are privileged to transfer, to whomsoever they may think proper, by sale, gift, or otherwise, their proprietory right in the whole or any portion of of their respective estates, without applying to Government for its sanction to the transfer, and that all such transfers will be held valid, provided that they be conformable to the Mahomedan and Hindoo laws (according as the religious persuasions of the parties to each transaction may render the validity of it determinable by the former or the latter Code), and that they be not repugnant to any Regulations now in force which have been passed by the British Administration or to any Regulations that they may hereafter enact."

Section 10, Article IX, declares that "it is essential that a notification should be made of the principles upon which the fixed assessment charged on any estate will be apportioned on the several divisions of it in the event of the whole of it being transferred by public or private sale or otherwise in two or more lots, or of a portion of it being transferred in one or in two or more lots, or of its being joint property, and a division of it being made amongst the proprietors; otherwise, for the want of a declared rule for estimating the proportion of the fixed jumma, with which the several shares would be chargeable in such cases, the real value of each share would be uncertain, and consequently the benefits expected te result from fixing the public assessment on the lands would be but partially obtained. The Governor-General has accordingly prescribed the following rules for apportioning the fixed assessment in the several cases above mentioned; but as the Government might sustain a considerable loss of revenue by disproportionate allotments of the assessment were the apportioning of it in any of the cases above specified to be left to the proprietors, he requires that all such transfers or divisions as may be made by the private act of the parties themselves be notified to the Collector of Revenue of the zillah in which the lands may be situated, or such other officer as Government may, in future, prescribe, in order that the fixed jumma assessed upon the whole estate may be apportioned on the several shares in the manner hereinafter directed, and that the names of the proprietors of each share, and the jumma charged thereon, may be entered upon the public registers, and that separate engagements for the payment of the jumma assessed upon each share may be executed by the proprietors, who will thenceforward be considered as actual proprietor of the land. And the Governor-General in Council declares that if the parties to such transfers or divisions shall omit to notify them to the Collector of the Revenue of the zillah, or such other officer as may be hereafter prescribed for the purposes before mentioned, the whole of such estate will be held responsible to Government for the discharge of the fixed jumma assessed upon it, in the same manner as if no such transfer on division had ever taken place."

The case of grants by a zemindar of portions of his zemindaree is dealt with by Clause 3 :—"When a zemindar, independent talookdar, or other actual proprietor of land, with or on behalf of whom a settlement has been or may be concluded, shall transfer the whole of his or her estate in two or more distinct portions to two or more persons, or a portion thereof to one person, or to two or more persons as joint property by private sale, gift, or otherwise, the assessment upon each distinct portion of the estate so transferred shall be fixed at an amount which shall bear the same proportion to its actual produce as the assessment upon the whole of the estate of the transferring proprietor, of which the whole or a portion may be so transferred may bear to the whole of its actual produce. This produce shall be ascertained in the mode that is or may be prescribed in the existing Regulations, or such other Regulations as

Government may hereafter adopt, and the person or persons to whom such lands may be transferred, and his or her or their heirs and lawful successors, shall hold them at the jumma at which they may be so transferred for ever; and where only a portion of such estates shall be transferred, the remainder of the public jumma, which will consequently be payable by the former proprietor of the whole estates on account of the lands that may remain in his or her possession, shall be continued unaltered for ever."

We have now seen that, under Regulation I of 1793, it is declared that the jumma assessed, or to be assessed, under the Regulations for the decennial settlement on the lands of zemindars, is fixed for ever; that such zemindars, their heirs, and successors, will be allowed to hold their estates at such assessment for ever; that they are privileged to transfer, to whomsoever they may think proper, by sale, gift, or otherwise, their proprietory right in the whole, or any portion of their estates, without applying to Government for its sanction to the transfers; and that such transfers will be held valid, provided * * they be not repugnant to any Regulations now in force which have been passed by British Administration, or to any Regulations that they may hereafter enact.

Rules are laid down for the appointment of the fixed assessment charged on any estate on the division of it, or of a portion being transferred. The Governor-General requires that all such transfers as may be made by the private act of the parties shall be notified to the Collector in order that the fixed jumma may be apportioned on the several shares, and the names of the proprietors charged herewith entered upon the public registers, and that separate engagements for the payment of the jumma assessed upon each share may be executed by the proprietors, who will thenceforward be considered as actual proprietors of the land.

Then comes Clause III:—"When a zemindar shall transfer* * a portion of his estate to one person, the assessment thereof shall be fixed at an amount which shall bear the same proportion to its actual produce as the assessment of the whole of the estate of the transferring proprietor, of which the whole or a portion may be so transferred may bear to the whole of its actual produce."

It must be observed that Section 10 of Regulation I of 1793 provides for the case of divisions and transfers of portions of the estate. Where the parties to such divisions and transfers omit to notify them to the Collector of Revenue for the purpose of enabling him to apportion the fixed jumma on the several shares, and cause separate engagements to be entered into for the payment of the jumma assessed on each share, in such cases the whole of the estate is to be held responsible to the Government for the discharge of the fixed jumma as if no apportionment had taken place.

Such is the effect of a mere omission to notify the transfer to the Collector.

That is not the case we have to deal with. The question proposed is as to the effect of a grant by a zemindar to hold land rent-free, or, as it is expressed in the grants in the case before us, "lakheraj."

I understand by that a grant of land to hold in absolute proprietory right, not only free from the payment of any rent in money, but without any dependence on, or duty to, the zemindar.

Where the grantee holds subject to the performance of any duty or conditions, the Regulations appear to treat him as a lease-holder, not as a person having an absolute ownership. (*See* Section 7, Regulation VIII of 1793.) Regulation XLIV of 1793, Section 8, shows that it is contemplated that, under certain circumstances, leases may be granted in perpetuity; in other words, that there may be a lease, though there is no reversionary estate in the lessor. Perhaps it is not very material whether the liability to perform the duty is strictly in the nature of rent or not. In a former case, I stated my opinion that rent may be a payment in money or in kind, or may consist in a duty to be performed by the tenant. That is in accordance with the definition of the word "rent" by Lord Coke. It is the legal construction of a plain English word,—a construction which has been put on it in Courts of Justice from the time of the Second Institute to the case of Doe on the demise of Edney against Benham, decided by the English Court of Queen's Bench in 1845, reported 7 Q. B., 976.

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I therefore at once lay aside cases like that of the grants of land for a tank, where, by the grant, the grantee holds subject to the obligation of permitting water to be taken by or for the benefit of the inhabitants of the zemindaries or their cattle. It seems to me that, in the Code of 1793, such persons are treated not as holding under grants, but as lease-holders.

I now come to the Regulation which we have to construe.

The preamble of Regulation XIX of 1793 recites that, "by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every beegah of land (demandable in money or kind according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zemindar made a grant of any part of his lands to be held exempt from the payment of revenue, it was considered void, from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenues of Government would have been liable to gradual diminution. Previous, however, to the Company's accession to the Dewanny, numerous grants of this description were made, not only by the zemindars, but by the officers of Government appointed to the temporary superintendence of the collection of the revenue, under the pretext that the produce of the land was to be applied to religious and charitable uses. Of these grants, some were applied to the purposes for which they professed to have been made; but, in general, they were given for the personal advantage of the grantee, or with a view to the clandestine appropriation of the produce to the use of the grantor, or sold to supply his private exigencies. In conformity with the principles which prevailed under the native administration, the British Government have at various times declared all grants for holding land exempt from the payment of revenue made since the Company's accession to the Dewanny illegal and void."

After some recitals, which I do not think it necessary to set out, the preamble proceeds to state that, "with a view to facilitate the recovery of the public dues from lands held exempted under invalid grants, as well as to prevent any similar alienations being hereafter made to the prejudice of the security of the public revenue which has been assessed in perpetuity upon the estate of individuals," &c., the following rules, containing the rules passed on the 1st of December, 1790, with modifications, have been enacted.

By Clause 2, grants for holding land exempt from the payment of revenue made previous to the 12th of August, 1765, are declared valid, provided the grantee actually obtained possession previous to that date, and has since held possession without having been subjected to the payment of revenue.

By Clause 3, all grants for holding land exempt from the payment of revenue made since the 12th of August, 1765, and previous to the 1st of December, 1790, by any other authority than that of Government, and which may not have been confirmed by Government, or by any officer empowered to confirm them, are declared invalid.

Clauses 4 to 9 contain provisions declaring who are to be deemed entitled to the proprietary rights and to the revenue of such last-mentioned lands, and for fixing the assessment thereon.

Clause 10 is as follows:—"All grants for holding land exempt from the payment of revenue, whether exceeding or under 100 beegahs, that have been made since the 1st of December, 1790, or that may be hereafter made by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil, or the rents of it. And every person who now possesses or may succeed to the proprietory right in any estate, or dependent talook, or who now holds, or may hereafter hold, any estate or dependent talook in farm of Government, or of the

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proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or talook held khas, 'is authorized and required to collect the rents from such lands at the rates of the Pergunnah, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or talook in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any officer of Government; nor shall any such proprietor, farmer, or dependent talookdar be liable to an increase of assessment on account of such grants which he may resume and annul during the term of the engagements that he may be under for the payment of the revenue of such estate or talook when the grant may be so resumed and annulled. The managers of the estates of disqualified proprietors and of joint undivided estates are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this Section.'"

We have to consider what is meant by the expression "grants for holding land exempt from the payment of revenue that have been made since the first of December, 1790, or that may hereafter be made."

The first thing to be observed is that the Legislature is dealing with grants.

By the term "grants," as here used, I understand grants of the absolute proprietary right in the soil, as distinguished from leases.

Reading Regulations I of 1793, Section 10, and VIII of 1793, Section 5, Clauses 2, 3, 4, and 5, it seems clear that those persons only who pay revenue are under the Regulations considered proprietors of the lands held by them.

Leases are dealt with by a separate enactment, (Regulation XLIV of 1793.) If a zemindar makes a grant of the proprietary right in the land, and the object and meaning of the grantor and grantee, to be collected from the grant itself, is that the grantee should hold the land without payment of revenue, the case falls within the terms of the enactment.

Now, there are two modes in which the grantee may hold subject to the payment of revenue, either by holding at a revenue assessed on the alienated share, and under engagement in respect thereof with the Government under Section 10, Regulation I of 1793, or by holding the land granted as a dependent talook, as provided for by Regulation I of 1793, Section 10. In this latter case, the Legislature contemplates that the revenue must be paid by the dependent talookdar through the zemindar. On referring to Sections 5, 6, and 7 of Regulation VIII of 1793, it appears that there are two classes of dependent talookdars: *first*, those who are owners of the soil, and pay revenue through the zemindar; and, *secondly*, those who are considered as lease-holders only. Now, from Section 10, Regulation I of 1793, and the preamble, and Section 6 of Regulation XLIV of 1793, it is clear that a zemindar may create a dependent talook of either description; and if so, he can make a grant subject to the payment of revenue payable through himself.

Regulation VIII also shows that a zemindar, after the decennial settlement, could make a grant exempt from the payment of revenue for a limited period. The definition of jungleboore talookdars in Section 8 is as follows:—"The pottahs granted to these talookdars, in consideration of the grantee clearing away the jungle and bringing the land into a productive state, give it to him and his heirs in perpetuity, exempting him from payment of revenue for a certain term, and at the expiration of it subjecting him to a specific assul jumma, with all increases, abwabs, and mhatoots imposed on the pergunnah generally," &c.

From this and other passages, which may be cited, it is clear that the word "revenue" is not invariably used in the sense of public revenue collected directly by the Government.

It should also be observed that the words are "grants for holding land exempt from the payment of the revenue." There may be a grant for holding land so exempt, although the grant has not the effect of exempting the land from liability to sale, should the grantor fail to pay the revenue,—if the grant

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is one under which, as between grantor and grantee, the grantee is to hold free from the payment of revenue.

The object of the enactment of Section 10, as stated in the preamble of the Regulation XIX, is not to prohibit grants releasing the revenue, or absolutely exempting land from the payment of public revenue. Such, of course, are grants which none but the Government could make or affect to make. The expressed object was to prevent alienations, similar to those which had been previously spoken of, to the prejudice of the security of the public revenue.

It has been suggested that the Section must be read as if it were confined to alienations of land made by zemindars after 1790, and before the completion of the permanent settlement. But the preamble shows that the enactment was to protect "the public revenue which has been assessed in perpetuity upon the estates of individuals," not to secure the Government from loss in an assessment, to be afterwards made. Again, it includes all grants that have been made since the 1st of December, 1790, "or that may be hereafter made." This language appears wholly inconsistent with the notion that the Legislature was dealing merely with grants to be made while the settlement was in progress.

It appears to me clear that grants made for holding land free from the payment of rent, and not subject to the performance of any duty to the zemindar, and free from the payment of revenue to the Government or zemindar, are under Section 10, Regulation XIX of 1793, null and void; and that what are ordinarily called rent-free grants are of this description.

There was nothing new in the prohibition. Zemindars and farmers, as early as 1772, were bound by an express clause in their leases not to confer any grants without the knowledge and sanction of Government.

In 1782, a plan, for the institution of a Bazee Zemin Duftur, proposed by the Calcutta Committee of Revenue, was approved of by the Governor-General in Council. This document refers to the loss sustained by Government in its revenues in consequence of the alienation of lands without its authority. It states that zemindars had continued to violate the stipulation not to confer grants without the authority of Government: that the practice affects the revenues of Government, *first*, by the alienation of the lands included in the general rental; and, *secondly*, by lessening the value of the revenue lands: that this was effected by withdrawing the ryots from the revenue lands and inducing them to settle in the Bazee Zemin, which the proprietors could afford to rent to them on easier terms than a farmer or zemindar who pays an assessment for lands held by him. It was proposed that Bazee Zemin lands should be registered, after the titles under which they existed should have been ascertained.

Certain principles were laid down as to lands alienated after the 12th of August, 1765; and, amongst other things, it was declared "that as the Governor and Council of Bengal only have the authority to alienate lands from the jumma, all grants made by any other persons whatever, without their authority, and which have not been subsequently confirmed by their sanction, would be deemed invalid; and a rule was sanctioned that all grants of land subsequent to the grant of the Dewanny to the Company under the general denomination of 'lakhiraj,' 'gair Cummai,' &c., should be declared invalid, excepting such as have been confirmed, &c. (See 3 Colebrook's Digest, Vol. 3, pages 224-231.)

In the Regulation respecting "lakhiraj lands" passed by the Governor-General in Council, 1st December, 1790, it is enacted by Section 2 that "all grants of rent-free land made or confirmed since the 12th of August, 1765, by any other authority than that of Government, and which have not been confirmed by them, shall be held invalid, and liable to resumption," &c. By Section 8, "any person who may purchase a village or villages, either by private or at public sale, subsequent to the date of these Regulations, shall be entitled to the property in the soil, and the Government's share of the produce, whether it be more or less than one hundred sicca rupees per annum, of all portions of such village or villages that may have been alienated since the date

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of this Regulation, and prior to the date of his purchase," &c. Section 11 directs that suits for the resumption of such lands shall be brought in the Court of the Collector of the District. (See 3, Colebrook's Digest, Vol. 3, page 292.)

We have seen that Regulation I of 1793, Section 8, empowers proprietors to transfer their proprietary rights in the whole or any portion of their estates by sale, gift, or otherwise, without applying to Government for its sanction to the transfer, and that on the transfer, the fixed jumma is to be apportioned in the manner therein directed. In the prohibitory clause of the Regulation of 1790, the term used is "rent-free." The change to "free of revenue" in the Regulation of 1793, is rendered necessary by the power given to zemindars by Regulation I of 1793, to alienate any portion of their estates if a provision is made for the payment of the revenue in respect of such portion.

Except this necessary modification, there is nothing that leads to the inference that by grants exempt from the payment of revenue made since the 1st of December, 1793, or that may hereafter be made, the Legislature meant anything different from the rent-free grant spoken of in the earlier Regulation It appears to me difficult, if not impossible, to give any meaning to the words "grants for holding land exempt from the payment of revenue that may hereafter be made," except by supposing it to refer to grants free of all payment whatever in respect of rent or revenue, either to the Government or the zemindar. It was no new or hasty enactment, but was consistent with the whole course of legislation on the subject from the time of the Company's accession to the Dewanny, throughout which the principle is constantly asserted that the revenue-paying estates should be preserved entire in the hands of the parties by whom the revenue was to be paid.

If the meaning of the law is clear, and the language positive, no further enquiry is necessary. Whatever may be thought of the policy of any particular enactment, whether in particular cases it may appear to be likely to operate harshly or not, it is the duty of Courts of Justice to administer the law as they find it. To use the words of their lordships in delivering the judgment of the Privy Council in the case of Moonshee Buzloor Ruheem *versus* Shumsoonissa Begum :—"If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it." (VIII Weekly Reporter, Privy Council Cases, 12.)

But if it is suggested that the construction I put upon the language of Section 10 involves such hardship and injustice that such construction cannot be the true one, and that it must be supposed that the Legislature meant something different from that which seems to be the natural meaning of the words used, I am prepared at once to join issue on that point.

The enactment is really no more than this, that from henceforth no man shall hold lands in full proprietary right without contributing to the land tax, either by a direct payment to the estate, or, if he holds as a dependent talookdar, by payment to or through the zemindar of such "revenue" as shall be fixed by the zemindar.

Short of this, and subject to the limitation as to leases, to which I shall come presently, there is no sort of estate or interest which a person desiring to possess land could not, under the Regulations of 1793, acquire by grant from a zemindar. I do not understand what hardship there is in limiting the zemindar's powers of alienation, as I believe Section 10 limits them. A zemindar has full powers to alienate the lands held by him, or any part thereof, absolutely, so that the purchaser or grantee may hold the portion of land granted to him as a distinct estate free from all obligation towards, or dependence upon, the zemindar or his successor. But in the case of grants of independent estates, where the grantee is to hold in full proprietary right free from all obligation to the zemindar, he must hold subject to the same conditions as those under which the zemindar had held it, the conditions under which all land in the country is held, unless specially exempted by grant made or confirmed by

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the sovereign authority, *viz*, subject to the payment of the proportion of the Government revenue properly chargeable on the land.

There is nothing unreasonable in such a rule. It does not, in any degree, interfere with the absolute power of disposition on the part of a zemindar, or of acquisition on the part of an intending purchaser; and it can in no way affect the marketable value of the land in the hands of the zemindar.

For myself, I am wholly unable to understand the view of the Chief Justice, and those learned Judges who appeared to think it necessary, convenient, or reasonable that a zemindar who holds land, every beegah of which is charged with the payment of Government revenue, should be allowed to alienate land to be held by the alienee under conditions more favorable than those on which the zemindar held it. I will quote the words of Lord Brougham in the case of Keppell *versus* Bailey, 2 Mylne and Keen, 517:—"There are certain known incidents of property recognized by the law. But it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient, both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment, and is a reasonable liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding real property, and to impress on their lands and tenements a peculiar character which should follow them into all hands, however remote." On these principles, one would expect to find that a zemindar might bind himself and his heirs by a personal covenant to pay the revenue of an alienated portion of the estate, but could not grant lands to be held free of the payment of revenue or annex to his estate, so as to bind an assignee, an obligation to pay revenue in respect of lands alienated by him.

But the Regulation goes further. The preamble shows that the object of the enactment was to prevent such alienations to the prejudice of the security of the public revenue.

Now, it must be remembered that at the date of these Regulations the Government revenue was equal to ten-elevenths of the total rental. The estimated surplus of the total collections from the land, over and above the Government revenue, or, in other words, the beneficial interest of the zemindar, was no more than ten per cent. on the revenue. (See the preamble of Regulation II of 1793, and Bengal Special Orders; Regulation VIII of 1793, Sections 75-77.)

If zemindars had been left at liberty to make absolute grants of portions of their lands free of revenue or rent, it is certain that great difficulty might have been thrown in the way of the Government in realizing the public revenue from the land. We shall see presently that, by Regulation XLIV of 1793, the power of zemindars to grant leases was restrained with the express object, *viz.*, of preventing them from impoverishing themselves and their heirs. It would have been preposterous to limit thus the power of zemindars to grant leases if they were left free to grant their lands to hold free of rent in fee simple.

Again, at the time of the permanent settlement, no survey had taken place. If, immediately after the settlement, the zemindaries could have been split up and sub-divided, and large portions of them disannexed from the parent estates by rent-free grants without notice to the Government, the security of the Government revenue would have been enormously imperilled. There would have been great risk that the boundaries of zemindaries would have become confounded. It may be said that if the zemindar made default, the whole estate might be sold, and the grantees of the zemindar would have no title as against the auction-purchaser. But the officers of Government would probably have had great difficulties in identifying the lands to be sold; and it is by no means clear that the zemindaries, when sold, would have realized prices sufficient to cover the arrears. I believe that, as a matter of fact, in almost every case a

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purchaser at a sale for arrears of revenue would have bought little more than a crop of lawsuits.

In view of these dangers to the security of the public revenue, the stringency of the enactments of Section 10 is perfectly intelligible. The case has been compared by some of those learned Judges who differ from me with the well known instances of leases by ecclesiastical persons. (See Bacon's abridgment *tit.* leases, (H.), and the case of Ranee Surnomoyee *versus* Maharajah Suttischunder Roy, decided by the Privy Council and reported in II Weekly Reporter, page 13, has been referred to.) But the construction put upon the Statutes in question depends upon the fact that the leases are good at common law, and the Statutes were made for the benefit of the successors of the party creating the void lease, and not to enable him to avoid his own act. Here the enactment is for the security of the public revenue; the language is clear and imperative, and makes it not only the right, but the duty of every person possessing the proprietary right in any estate, to dispossess the grantee in possession under a grant for holding land exempt from the payment of revenue, and to re-annex it to the estate in which it may be situated. So far, therefore, as the assignee or heir of the original grantor is concerned, there appears to me no doubt that the grant is void as against them.

Whether or not the grantee paid a valuable consideration to the original grantor, does not, in my opinion, affect the position of a person who has deliberately chosen to endeavour to acquire property under conditions prohibited by law. Grants of land free of revenue, created with a view to the personal advantage of the grantee, or even with a view to the clandestine appropriation of the produce to the use of the grantor, sold to supply his private exigencies, are, amongst others, specially aimed at in the preamble of Regulation XIX.

I am not bound to consider what would be the position of the parties if the question arose between the original grantor and grantee, or how far the heirs of the grantor may be compellable to make restitution out of his estate if, in obedience to the provisions of Section 10, they dispossess the grantee. These questions are not raised in the case before us. I believe there would be no insuperable difficulty in doing justice between the parties. But as regards a person taking the zemindaree by private purchase from the original grantor on the principle stated by Lord Brougham in the case I have already referred to, I believe that, by taking the estate, he would be in no way bound by the act of the former owner. And as regards the heirs of the former owner, the maker of the void grant, whether may be the liability of the ancestor's estate in their hands, to answer for their act in entering on lands contrary to his grant, I must give the same answer, *viz.*, that the grant is void as against them.

The Regulations of 1793 constitute an entire Code, and were passed on the same day. In order to show how and in what manner the Legislature meant to provide for the security of the public revenue, I propose to read the preamble of Regulation XLIV:—

"The public demand upon the estates of the proprietors of lands with whom a settlement has been or may be concluded under the original Regulations for the decennial settlement, having been declared fixed for ever, it is to be apprehended that many proprietors, either from improvidence, ignorance, or with a view to raise money, or from other causes or motives, may be induced to dispose of dependent talooks to be held at a reduced jumma, or fix the jumma of the dependent talooks now existing in their respective estates at an underrate, or let lands in farm, or grant pottahs for the cultivation of land at a reduced rent for a long term, or in perpetuity. Such engagements, if held valid, would leave it in the power of weak, improvident, or ill-disposed proprietors to render their property of little or no value to their heirs; promote vice and injustice; occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the amount of the public demands upon their estates; be an abuse of the great and lasting benefit which has been conferred upon the landholders by the possession of their lands being secured to them in perpetuity at a fixed assessment; and, moreover, be

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repugnant to the ancient and established usages of the country, according to which the dues of Government from the lands (which consists of a certain proportion of the annual produce of every beegah of land demandable, according to the local custom, in money or kind, unless Government has transferred its rights to such proportion to individuals for a term or in perpetuity, or fixed the public demand upon the whole estate of a proprietor of land, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, so long as he continues to discharge the latter) are inalienable without its express sanction. It is at the same time essential that proprietors of land should have a discretionary power to fix the revenue payable by their dependent talookdars and to grant leases, or fix the rents of their lands, for a term sufficient to induce their dependent talookdars, under-farmers, and ryots to extend and improve the cultivation of their lands, and that such engagements should be held inviolable in all cases, except where they may interfere with, or affect in any shape, the primary and indefeasible rights of Government. Upon the above grounds, and as the proprietors of lands, previous to the decennial settlement being declared perpetual, were not entitled to enter into any engagement with their dependent talookdars, under-farmers, or ryots, for a period extending beyond the term of their own engagements with the public, the Governor-General in Council has enacted," &c.

Section 2 provides that the jumma of dependent talooks is not to be fixed, nor farms or pottahs granted for a term exceeding ten years.

By the 8th Section, nothing contained in this Regulation shall be construed to prohibit actual proprietors of land granting, without the sanction of Government or its officers, to any person not being a British subject, or a European, a lease or pottah for ground for any term of years, or in perpetuity, for the erection of dwelling-houses, or buildings for carrying on manufactures, or for garden, or other purposes, and for offices for such houses, or buildings.

It has been supposed that the 8th Section enabled zemindars to grant leases for the purposes named in perpetuity at any rate of rent. But I think this construction appears open to some doubt.

The language of Section 2 is that no zemindar shall dispose of a dependent talook to be held at the same or any jumma, or fix at any amount the jumma of an existing dependent talook for a term exceeding ten years; nor let any lands in farm, nor grant pottahs to ryots or other persons for the cultivation of lands for a term exceeding ten years. The change of the language in the second branch of this clause should be noticed. It may be that the true construction of Section VIII, read in connection with Section 2, and the definitions of dependent talooks to be found in Regulation VIII, is that a lease for the purposes named is, in effect, a dependent talook, and as such may be granted for any term of years, or in perpetuity, but not subject to a fixed rent. If so, the supposed inconsistency of the provisions of Section 10 of Regulation XIX with Section 8 of Regulation XLIV of 1793, has no existence whatever. However that may be, a lease under Section VIII is only grantable for limited purposes, and does not disannex the land granted from the revenue-paying estate.

I will observe, by the way, that the cases in the 6 Select Reports, page 281, and the Sudder Dewanny Reports of 1852, page 967, referred to by Mr. Justice Jackson, if carefully examined, will be found to amount to no more than this, that the lands held under the grant alleged to be invalid were not within the limits of the portion of the zemindary held by the party claiming to assess and re-annex them to his estate. There is really no decision in either case as to whether the rent-free grant was valid or not.

In special appeal 116 of 1862, the facts, as stated at the bar, are that the grant is one made in the year 1815, A. D., or 1222 Fuslee, by Murijla Koer and Kousila Koer, the two widows of Moorlychand, in favor of Peary Sen Gywal, for the performance of the Gya Shrad of Moorlychand. The plaintiff was the purchaser of a four-anna share in the mouzah within which the land held rent-free was situate.

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The judgment of both the Lower Courts was that the rent-free grant, being made subsequent to 1790, is liable to resumption.

And for the reason already given, I am of opinion that it is null and void as against the plaintiff.

The question proposed by the Division Bench does not really arise at all in the special appeal 253 of 1863.

The suit is one to resume and assess lands within the plaintiff's mourosee ijara.

As to plots 2 and 3, which were granted for the purpose of making a tank at which the village cattle might drink, I believe we all agree. Indeed the case is governed by that of Peezeerooddeen *versus* Muhhoosoodun Pal Chowdry, reported in 2 Sutherland's Weekly Reporter, page 15, by which I suppose this Bench is bound.

As to plots 1, 5, 6, 7, 8, 9, 10, and 11, they were granted by the plaintiff's predecessors in title rent-free, or, as it is expressed in the grants or some of them, "lakheraj," at various times between 1815 and 1842, in consideration of the payment of sums of money which perhaps represent, and may be taken to be a fair price for the land.

The peculiarity of the case is that the grants are made by a mourosee ijaradar who for all that appears may be a mere subordinate tenant of the zemindar, in no way connected with the payment of Government revenue.

The mourosee ijara pottah under which the plaintiff and his ancestors held is not in evidence, but I will assume, for the purposes of the argument, that it places the ijaradar in the same position as a putneedar. Of course I cannot assume that the ijara pottah contains any special clause enabling the ijaradar to bind the zemindar of the nature referred to in Section 11 of Regulation VIII of 1819 as being one which may or may not exist in putnee pottah.

The Legislature, in Regulation XIX of 1793, was dealing with zemindars and their grants. That appears clearly form the preamble. There is nothing in the Regulation which applies to grants by persons other than zemindars, or grants other than those out of the revenue-paying estate.

The rent-free grants now under consideration are carved out of a subordinate estate.

Except so far as they may be prohibited by positive law, rent-free grants are good.

If a tenant renting a few villages from a zemindar makes a rent-free grant out of his subordinate estate, there seems no reason why such grant should not be good as against him and his heirs. It makes no difference whether the quantity of land comprised in the subordinate estate is large or small; whether it is a small part of, or even the whole, zemindary.

A grant by a subordinate tenant would not disannex the land from the revenue-paying estate. The tenant would pay rent for all the land comprised in the sub-grant, and the zemindar would pay revenue for it. If the subordinate tenure were sold by the zemindar or putneedar for arrears of rent, the rent-free tenure granted out of it would fall as of course, for though, by express legislation, some under-tenures created by subordinate tenants are protected in case of the sale of the tenure for arrears of rent, (as by Regulation VIII of 1819, Section XI,) such provisions do not exonerate rent-free holders from the liability to be called on for the payment of a fair rent to the purchaser at such a sale. Reading Section XII, and referring to Section XI of Regulation VIII of 1819, it appears to be taken as of course by the Legislature that if a putnee talook is sold under any decree other than for arrears of rent, the purchaser succeeds to more than the reserved rights of the former tenant, such as they may be, and is subject to any restriction put upon the tenure by his act.

The Legislature treats it as clear that sales, gifts, and limited assignments by a putneedar would be valid as against his heir or any person who, whether by purchase or otherwise, succeeds to no larger interest than the putneedar himself possessed.

I think that the grants in question in special appeal 253 are not affected

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by Regulation XIX of 1793, Section 10, and are binding on the grantors and their heirs. I would decree the appeal in this case with costs, reverse the decision of the Court below, and dismiss the suit, except as to the land in Dags Nos. 4 and 5, with costs.

I may observe that Mr. Trevor and Mr. Loch, on the 28th November, 1860, in the case of Luckhun Acharj *versus* Tarrachand Dutt (not reported), held that a lakherajdar cannot resume lakheraj within his lakheraj estate.

Bayley J.—On the question of whether the papers sent to the Registrar as judgments of Mr. Justice Trevor and Mr. Justice G. Campbell (retired), and Mr. Justice Shumboo Nath Pundit (deceased), shall have the full effect of judgments, I am of opinion that, under the ruling in the Exchequer Chamber, Law Reports, (Common Law Series) Volume II, part 4, page 223, these judgments cannot have effect as judgments properly so called, but are still entitled to be recorded and considered as opinion laid down in the case above cited.

But at the same time I think that the previous fully recognised practice had led the above Judges of our Court to record their judgments as they did, when they found they were not called upon by the Chief Justice to deliver them before the retirements of the two, and the death of the third, and so had no opportunity to do otherwise than they did.

I deposited my own in this case as a proposed judgment in February or March, and considered that it might, or it might not, become a final judgment, when I might be called upon to use it in that light, either with or without further discussion.

In the other case of 16th March 1864, (which will be referred to by the Chief Justice) I am free to admit that, although I called it "a note of a judgment," still I considered it would have the effect of a judgment; but I have at the same time to notice that the decree was signed by the other Judges only, and not by me.

I believe, however, that Justices Trevor and Loch did, in fact, look at it as a judgment wrongly, I now of course fully admit, with reference to the law and precedent of the English Court above cited by me.

After the judgments which we have already heard, and with reference to a still more elaborate one proposed to be delivered by the Honorable the Chief Justice, which we have had the advantage of seeing, I will not state again, in detail, all the facts of these cases, and all the provisions of the laws bearing on the subject before us. But I shall limit myself to the question which we have to answer, to the answer I consider the proper one to give, and to my reasons for my opinion.

The question we have to answer is "how far a grant for valuable consideration by a zemindar of a specific portion of land to be held without payment of rent is valid against the heir of the grantor or purchaser by private sale of the estate."

I would answer the question by saying that, in my opinion, such a grant is not valid against the heir or private purchaser when made either by the zemindar or (as in one case here) mourosee ijaradar.

My reasons for that opinion are these. I apprehend there is no question now that such grants 'before' the permanent settlement were invalid.

Article 1 of the Proclamation in Regulation I of 1793, says that "in the original regulations for the decennial settlement, it was notified to the proprietors of land with, or on behalf of whom a settlement might be concluded, that the jumma assessed upon their lands under those regulations would be 'continued' after the expiration of the ten years, and remain unalterable for ever"

In my view, these words shew, not so much an entirely new contract with a class of proprietors never before existing, as the 'continuance of the jumma assessed when the zemindar was a collecting agent' with a 'new' class of zemindars, let in, I admit, as proprietors, but still let in 'only under the provisions and stipulations and restrictions' laid down in all the regulations passed on the 1st May 1793, which form, in fact, one code of revenue settlement and administration.

Special Appeal from Mymensingh.

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RENT SUITS.

CASE 1756 OF 1867.

Sofaool Khan and another, (Defendants) *Appellants, versus* Woopean Khan and another, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Bayley*, J.

Baboo Kishendyal Roy for Appellants.
No one for Respondents.

The question is whether the defendant had any right to eject the plaintiff, except by due course of law. The plaintiff had held under the zemindar for a lease which had expired; but he had been allowed to hold over with the consent of the zemindar The zemindar subsequently granted to the defendant a likhun or a pottah.

The second ground of objection is that the Court was wrong in not holding that the instrument was a pottah; but it is unnecessary to determine whether it was a pottah or not; for, assuming it to be a pottah, which is the most favorable view for the defendant, he had no right to eject the plaintiff without proceeding in due course of law

Section 25 of Act X of 1859 authorizes a zemindar who requires assistance to eject a tenant after the determination of his lease or tenancy to apply to the Collector, and directs the Collector to proceed and to pass orders in the manner provided for suits under the Act. The defendant having a pottah from the zemindar, was not in a better position than the zemindar would have been if he had not granted the pottah to the defendant.

Section 25 of Act X of 1859 authorizes a zemindar requiring assistance to eject a tenant to apply to the Collector for it. This does not imply that he may eject the tenant by force, if he can, himself He must in every case proceed to eject by due course of law, otherwise the tenant can apply, under Section 15, Act XIV, 1859, to be restored to possession.

It is said that a zemindar is not bound to apply to the Collector for assistance under that Section, and that it is only optional with him to do so when he requires assistance; and that if he can turn the tenant out by force, he is at perfect liberty to do so.

It appears to us that that is an erroneous position, and that the zemindar is not at liberty to take the law into his own hands. The defendant having turned the plaintiff out of possession of his own authority, instead of proceeding in due course of law, the plaintiff sued to recover from him the possession which he had unlawfully taken, and the Court was quite right in decreeing for the plaintiff in that suit.

The case falls precisely within the terms of Section 15, Act XIV of 1859; for, even assuming that the defendant was not bound to ask the Collector for assistance under Section 25 of Act X of 1859, he ought to have proceeded by due course of law to recover possession from the plaintiff

Section 15 of Act XIV of 1859 says:—"If any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided the suit be commenced within six months from the time of such dispossession."

There is no ground of objection in this case that the suit was not commenced within the period limited by the Section. The plaintiff therefore having been, without his consent, dispossessed of the land otherwise than by due course of law, was entitled in this suit to recover possession from the defendant, notwithstanding the pottah or likhun which was set up by the defendant in the suit as his title.

The decision of the Lower Appellate Court will be affirmed without costs, as the respondent does not appear.

Resolution No. 48.

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Before *Kemp* and *Jackson*, J. J.

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Read a letter from the Sessions Judge of———, submitting a letter from the Magistrate of——with reference to the proceedings in the case of Chota Sadoo Peadah *versus* Bhoobun Chuckerbutty and others.

The offence of which the defendants were accused falls under Chapter X of the Penal Code, being a contempt of the lawful authority of a public servant. The rules connected with the prosecution of such a case are to be found in Chapter XI of the Code of Criminal Procedure.

When an offence against public justice, &c, is committed before any Court, the preliminary investigation which the Court is to make, before, in its discretion, sending the case for trial or regular enquiry before a Magistrate, may be *ex parte*.

When the Court is a Revenue one, it is not bound to proceed to adjudicate the case itself under Section 147, Act X of 1859.

In the present case, a peon of the Deputy Collector, in the discharge of his public functions, was voluntarily obstructed by the defendants. The Deputy Collector made such preliminary enquiry into the matter as was necessary to enable him to arrive at an opinion whether there was sufficient ground for investigating the charge, and finding, after taking the evidence of the peon and the decree-holder, that there was, he sent the case, not for trial, as the Deputy Magistrate supposes, but for investigation under Section 171 of the Code of Criminal Procedure. The Court are of opinion that it is unnecessary that the preliminary enquiry, contemplated by Section 171, should be conducted in the presence of the accused. All the Court making the enquiry has to do is to satisfy itself that there are *primâ facie* grounds for sending the case for investigation to a Magistrate.

The Deputy Magistrate was therefore clearly wrong in refusing to try the case on the ground stated by him, *viz.*, that the investigation by the Deputy Collector was an *ex parte* one, &c., &c. The Deputy Magistrate further holds that the Deputy Collector ought not to have sent the case to the Magistrate for investigation at all, but ought to have disposed of it under the provisions of Section 147, Act X of 1859. In this opinion the Court thinks he is also wrong. That Section enacts that any resistance or opposition to the lawful powers of a Collector under the Act may be punished by the Collector according to the provisions of the law for the time being in force for the punishment of resistance or of opposition to the processes of the Courts of Civil Justice. The Deputy Magistrate has not stated what law is in force for the punishment of such cases, and the Court know of no such law. But be this as it may, the Section quoted by the Deputy Magistrate leaves it in the discretion of the Collector to proceed according to any law for the time being in force or not. In this case the Deputy Collector chose to proceed under Section 171 of the Code of Criminal Procedure, and he was fully competent to do so. The case is returned to be tried, and the Court direct the Magistrate to take it up himself, or to send it to some other Deputy Magistrate for trial.

Reference from the Judicial Commissioner of Chota Nagpore in the case of the Queen versus *Radha Nauth Mozoomdar.*

13th January.

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

We are of opinion that the course taken by the Deputy Commissioner in committing the accused for trial without preliminary enquiry or investigation following on the charge of forgery, and merely upon the evidence taken before himself in the rent suit, was irregular.

When an offence of the nature specified in Section 168, 169, or 170, Criminal Procedure Code, is committed before a Court, it must, in every case, hold an investigation to see if there is a *primâ facie* case. It may after this send the case to a Magistrate for a regular "preliminary enquiry" under Chapter XII. But if it proceeds

A certain ambiguity is observable in the terms of Sections 171 and 173 of the Code of Criminal Procedure, which, while they make it discretional with the committing officer to hold such "preliminary inquiry" as may be necessary, require him in any case to "complete" or to hold an "investigation." A "preliminary enquiry" is that which takes place before the Magistrate, under Chapter XII of the Code, previous to commitment in cases triable by the Court of Session. (There is also a preliminary enquiry by the Police, Chapter IX.) What precisely is meant by investigation does not appear.

But it seems, at any rate, clear that any person who is to be tried before the Court of Session must have a charge regularly exhibited, and that (except

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under Section 173 to commit direct to the Court of Session, it must itself hold a complete preliminary enquiry, framing charges, and taking depositions.

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in cases coming under Section 172) such charge ought to be based upon depositions taken before the committing officer, which, in his opinion, go to substantiate such charge.

A commitment which is not based on such matter has therefore no reasonable or lawful basis, and as the irregularity has been brought to the notice of this Court before the trial, and while it is impossible to say whether the accused will be seriously prejudiced or not, we think it necessary and proper to order that the commitment be quashed, and that the Deputy Commissioner do proceed as by law directed, either under the 171st or 173rd Section of the Code.

Revision of Proceedings under Section 405 of the Code of Criminal Procedure in the case of Boodhooa, Prisoner.

Before *Peacock*, C. J., and *Seton-Karr*, *L. S. Jackson*, *Macpherson*, and *Hobhouse*, J. J.

This matter was referred to the Full Bench on the 12th August, 1867, under the following orders recorded :—

An officer vested, under Act XV of 1862, with power to sentence, to imprisonment up to seven years, may, where he has passed this, the maximum sentence within his competence, commute it to transportation for not less than seven years.

An ordinary Magistrate, who can only sentence to two years' imprisonment, cannot sentence to transportation for seven years or more in lieu thereof, merely because the offence before him is *punishable* with imprisonment for seven years and upwards. (L. S. Jackson, J., *dissenting*).

Jackson, J.—The Judicial Commissioner appears to have advised his subordinate that he was competent to pass the sentence of transportation.

It seems to me that an officer exercising the powers described in Section 1, Act XV of 1862, is not competent to pass such sentence, not having been expressly authorized by the Act to do so.

It is said that Section 59 of the Penal Code gives the power. I should understand that Section to be subject to the terms of Section 22 of the Code of Criminal Procedure, which defines and limits the power of the Courts, and with which the enactment first quoted must be read.

If the power is given by the words "competent to the Court which sentences such offender," then it must be given to Magistrates when sentencing offenders under Sections 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with seven years' imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Session; for there are no words in Section 59 which limit the power to Courts which are competent to pass sentence of seven years' imprisonment or more.

Act XV is to be read with the Code of Criminal Procedure, and I think it must be read in this way:—

First.—That the officers referred to are inserted in Section 22 between the Court of Session and the Assistant Sessions Judges in Bombay, with the powers stated.

Second.—That the 7th column of the Schedule is modified by inserting those officers against all cases, not capital, triable by the Court of Session, the result of which would be that the offender would be liable to a sentence of transportation, but that he would not be so sentenced by reason of want of power in the particular Court which tried him to pass such sentence.

It appears to me that the question ought to be referred to a Full Bench.

Dwarka Nauth Mitter, J.—I concur.

ORDER OF THE FULL BENCH.

Hobhouse, J.—The question before us is this. The Deputy Commissioner of Lohardugga is an officer invested, under Section 1, Act XV of 1862, with power to try certain offences, and, under the provisions of the Code of Criminal Procedure, to pass sentence of imprisonment of either description for a term not exceeding seven years. This being so, the Deputy Commissioner tried a person under the provisions of Section 459 of the Penal Code, and having sentenced that person to seven years' imprisonment, commuted that sentence, under Section 59 of the same Code, to transportation for a like term. The question is whether the Deputy Commissioner, having, under the words of the said Act XV of 1862, only power to pass a sentence of imprisonment, was competent, under Section 59 of the Penal Code, to commute that sentence of

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imprisonment into one of transportation. It seems to me that he was competent. It is very true that the Deputy Commissioner, being a person who is a chief officer charged with the executive administration of the district in criminal matters, is not a person whose jurisdiction is specially provided for under Section 22 of the Code of Criminal Procedure. But Act XV of 1862, Section 3, must be taken and read as part of the Code of Criminal Procedure. Then, under the Code of Criminal Procedure and that Act read together, the Deputy Commissioner was competent to punish the offender in question under the provisions of the Penal Code, Section 59, which runs in this way: "In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which, by this Code, such offender is liable to imprisonment." If therefore the Code of Criminal Procedure and the other Act read together do not expressly give jurisdiction to the Deputy Collector, I am still of opinion that Section 59 does, in so many words, give that jurisdiction, because it says that the Court which sentences, that is, which, under any law, is competent to sentence such offender, shall be competent to award a sentence of transportation instead of a sentence of imprisonment.

I would therefore send the proceedings back to the Judicial Commissioner, with instructions that the Deputy Commissioner had power to pass the sentence.

Macpherson, J.—I am of the same opinion. Section 1 of Act XV of 1862 vests the officer who tried this case "with power to try all offences not punishable with death, and, under the provisions of the Code of Criminal Procedure, to pass sentence of imprisonment for a term not exceeding seven years." Section 59 of the Penal Code says:—"In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which, by this Code, such offender is liable to imprisonment." It appears to me, reading these two Sections together, that the officer who has tried this case, having power to pass a sentence of seven years' imprisonment, had equally power to pass a sentence of transportation for seven years. The words of Section 59 are distinct, and, in my opinion, say clearly that in every case in which a Court has jurisdiction to try the case and to sentence to seven years' imprisonment, the Court may, in its discretion, give seven years' transportation instead of imprisonment.

It is said in the order referring the case to this Bench that "if the power is given by the words 'competent to the Court which sentences such offender,' then it must be given to Magistrates when sentencing offenders under Sections 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with seven years' imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Session; for there are no words in Section 59 which limit the power to Courts which are competent to pass sentence of seven years' imprisonment or more." But it appears to me that there is no substantial foundation for this argument if the natural and reasonable interpretation is put upon the words of Section 59. Magistrates trying offences under the powers given to them by the Code of Criminal Procedure (apart from the special provisions of Act XV of 1862), have undoubtedly jurisdiction to sentence offenders to imprisonment for no longer period than two years. In the case of a Magistrate exercising only such powers, there is nothing in Section 59 which would warrant an offender being sentenced to transportation. Section 59 applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to an imprisonment for seven years. Therefore a Magistrate who can imprison for only two years has certainly no power to transport at all.

A further argument in favor of the contention, that a sentence of trans-

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portation cannot be given in this case, has been drawn from the fact that in Section 22 of the Criminal Procedure Code a distinction is made between the powers of the "Court of Session" and of the "Assistant Sessions Judge" in Bombay, the Court of Session being declared competent to pass sentence of "death, transportation, imprisonment of either description for a period not exceeding fourteen years," &c., while the Assistant Sessions Judge in Bombay is limited in his powers to "imprisonment of either description for a term not exceeding seven years," &c. It is argued that, because in the case of a Court of Session, the word "transportation" heads the list of punishments which may be inflicted by the Court, and as the word "transportation" is omitted in the case of Assistant Sessions Judges, therefore sentences of transportation cannot be substituted by the latter class of Judges for sentences of imprisonment. But, in my opinion, the deduction which is made from the omission, in the second instance, of the word "transportation" is not correct, for a very sufficient reason for its omission is to be found in the fact that there are certain offences under the Penal Code for which transportation is either the only punishment which can be inflicted, short of death, or for which transportation is a substantive punishment in itself, and not merely one convertible with, or to be awarded in lieu of, imprisonment. When the offence committed is murder, for instance, the sentence must be either death or transportation for life. There are many Sections of the Penal Code in which transportation for life is mentioned, either as the only punishment, or any one of the punishments which may be awarded. Sections 450, 459, and 468 are instances of Sections which give the power of imprisoning only for two years, but, at the same time, authorize a substantive sentence of transportation for life. Therefore it seems to me that there is a very sufficient reason (quite independently of any intention to prevent the Assistant Sessions Judges from sentencing to transportation in lieu of imprisonment) why Sections 22 of the Code of Criminal Procedure should specifically name transportation as one of the sentences which Courts of Session are competent to pass. I see no reason to suppose it was intended that the power of sentencing to transportation in lieu of imprisoment for a term not exceeding seven years should not, under the provisions of Section 59 of the Penal Code, be exercised by Assistant Sessions Judges in Bombay.

In my opinion, in every case in which the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, the Court has also jurisdiction, under Section 59, in its discretion, to pass a sentence of transportation for seven years.

Jackson, J.—I am still of the same opinion that I expressed in referring this case for the consideration of a Full Bench, and in which my learned colleague Baboo Dwarka Nauth Mitter agreed.

My opinion is based chiefly upon the position that the Indian Penal Code is one that deals with the award of punishment, and the liability of the offender to such punishment, while the Criminal Procedure Code is the one which indicates the Courts which are to apply these provisions and to award the several degrees of punishment. I am not aware that any Section of the Indian Penal Code expressly defines, or in any way declares, what the powers of any particular Court shall be. Section 53 details the several punishments to which offenders are liable under the provisions of the Code; and they are specified, (1) as death, (2) transportation, (3) penal servitude, (4) imprisonment, which is of two descriptions, rigorous and simple, (5 and 6) forfeiture and fine. Section 59 declares that "in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years," that is, to transportation not less than seven years, and not exceeding the term for which, by this Code, such offender is liable to imprisonment. I do not understand by that Section that the transportation to be awarded in lieu of imprisonment was to be given precisely year for year; but there were certain limits fixed, namely, that transportation

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was to be for a term not less than seven years, and not exceeding the term for which the offender could be imprisoned. It is useful, in considering the effect of this Section, perhaps to refer to the Sections of the original Penal Code prepared by the Indian Law Commissioners. By Section 43 of that Code, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but the power was given to the Government of the Presidency. The words are:—"In every case in which sentence of imprisonment for a term of seven years or upwards has been passed on any offender who is not both of Asiatic birth and of Asiatic blood, it shall be lawful for the Government of the Presidency within which the offender has been sentenced, at any time within two years after the passing of such sentence, to commute the remaining imprisonment, without the consent of the offender, for transportation for a term not exceeding the unexpired term of imprisonment, to which may be added punishment for life or for any term from the territories of the East India Company." Apparently, in the long consideration which the Indian Penal Code underwent before it passed into law, it was considered that it would be more convenient to vest the power of passing sentence of transportation in the Court which tried the prisoner, instead of in the local Government. Here I do not understand that change in the provision of the law as in any respect importing any power as granted to the several Courts, or to any of the Courts, which they did not possess under the law which expressly regulated those powers. I am willing to construe Section 59 either strictly according to its words, or by what appears to me to be a reasonable construction. It seems to me that if that Section is to be construed strictly by its own words, as I have stated in my minute referring this case to the Full Bench, there is nothing whatever to prevent a Magistrate in those cases, when he has concurrent jurisdiction over an offence with the Court of Session, and where an offender might be punished with imprisonment to the extent of seven years, from passing, under this Section, a sentence of transportation; nor, of course, is there anything to prevent an Assistant Sessions Judge in Bombay from passing a like sentence. This consequence is avoided, in the opinion of my learned brothers, by stating that the Magistrate has no authority to pass sentence of imprisonment to the extent of seven years; but then, as I have already stated, it appears to me that transportation is not to be given in lieu of imprisonment year for year; but the law distinctly says that "whenever an offender is punished with imprisonment of seven years or upwards, it shall be competent to the Court which sentences such offender, whether that be a Court capable of awarding seven years' imprisonment or not, to sentence that offender to transportation for a term of not less than seven years."

Section 59 is a portion of the Indian Penal Code, which is otherwise called Act XLV of 1860. The Criminal Procedure Code was passed in the year 1861; it may therefore be looked upon as an expression of the later opinion of the Legislature; and if the provisions of these two laws in any respect conflict, I presume that the provisions of the later law must prevail. Now, Act XV of 1862, by Section 3, is to be taken and read as part of the Code of Criminal Procedure. I understand the meaning of that to be that the several parts of the Act XV of 1862 are to be taken and inserted in their appropriate places in the Code of Criminal Procedure; that is to say, that the definition of the status and powers of the officer described in Section 1 of that Act is to be put in its appropriate place in the 22nd Section of the Procedure Code. He would there probably take place after the Court of Assistant Sessions Judge in Bombay. Reading then the Courts referred to in that Section in the order in which they come, we find first the Court of Session, next the Assistant Sessions Judges of the Presidency of Bombay, thirdly, the chief officer charged with executive administration of a district in criminal matters in what may be called extra-regulation provinces. Section 22 says:—"The offences mentioned in the Schedule annexed to this Act shall, subject to the provision contained in the third explanatory note prefixed to the said Schedule, be triable by the Courts specified in column 7 of the said Schedule, and such Courts shall be competent

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to pass sentence in respect of such offences within the following limits." That I understand to be a declaration of the powers of the several Courts, implying that the Courts specified in that Section are to be restricted within the limits therein prescribed.

A difficulty arises in respect of certain cases which are not offences under the Indian Penal Code, but which are constituted and rendered punishable by later Acts, or by special or local laws. That difficulty does not occur in the present instance, as we are dealing with a case which is comprised in the Schedule annexed to the Code of Criminal Procedure, and is therefore governed by that Section. And then I understand that, also in column 7 of the said Schedule, the Court of the officer described in Act XV is to be inserted in every place where a Court of Session is now to be found, except in cases where the offence is punishable with death. The effect of that would be, I think, that in all cases the particular offences would be punishable by that Court, and that the limits of the powers of that Court to pass sentence would be imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both. I find myself unable to understand the argument which proposes to do away with the effect of the word "transportation" as used in the 22nd Section in speaking of the powers of the Court of Session. Transportation, it appears to me, it cannot be too often stated, is a separate description of punishment within the competency of one Court, and one Court alone, to award, namely, the Court of Session; and that Court is, it seems to me, alone authorized by law to award that particular punishment, and therefore, although, under Section 59 of the Indian Penal Code, particular offenders are made liable to transportation, that must be governed by the Section of the Criminal Procedure Code which limits the powers of the Court. It appears to me then that, taking the Penal Code together with the Code of Criminal Procedure, it must be pre-supposed that the Court which sentences is one which is by law enabled to pass the sentence of transportation.

I therefore think the Court of the Deputy Commissioner was not competent to sentence the prisoner to transportation, and that the sentence is not legal.

Seton-Karr, J.—I concur with my brothers Hobhouse and Macpherson.

The position and duties of officers in non-regulation provinces, vested with powers under Act XV of 1862, may, no doubt, occasionally appear somewhat anomalous; and it may be necessary to look closely, as in this instance, into the extent of the powers with which they are vested by law. But when I see that, by Act XV of 1862, the Deputy Commissioner is empowered to pass a sentence of imprisonment for a term not exceeding seven years, and when I consider that the punishments which he must award must be substantially the punishments of the Penal Code which he administers, I can come to no other conclusion than that, under Section 59 of that same Penal Code, he is empowered to pass sentences of transportation where he is empowered, as he undoubtedly is, to pass a sentence of imprisonment.

In this view I have only to say that I think the sentence of transportation passed by the Deputy Commissioner of Lohardugga is legal.

The Chief Justice.—I concur with the majority of my honorable colleagues in thinking that the Deputy Commissioner in this case had power to pass sentence of seven years' transportation. His powers were derived, not under the provisions of Section 22 of the Code of Criminal Procedure, but under Section 1 of Act XV of 1862. The substance of that Section is that, whenever, under the provisions of Section 445 of the Code of Criminal Procedure, the Code has been, or shall be, extended to any part of the territories not subject to the general regulations, it shall be lawful for the Governor-General in Council, or for the local Government of such territory, to vest the chief officer charged with the executive administration of a district in criminal matters, by whatever designation such officer is called, with power to try all offences not punishable with death, and, under the provisions of the said Code, to pass sentence of imprisonment of either description for a term not exceeding seven years, including such solitary con-

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finement as is authorized by law, or fine, or both. And by Section 3:—"This Act shall be taken and read as part of the Code of Criminal Procedure." I assume that, under the provisions of this Act, the Deputy Commissioner of Lohardugga was vested with the power, to pass sentence of imprisonment of either description for a term not exceeding seven years. Having that power, it appears to me that Section 59 of the Penal Code gave him the power, instead of passing sentence of imprisonment for seven years, to pass sentence of transportation for a term not less than seven years, and not exceeding the term for which the prisoner was liable to imprisonment. The Penal Code in that Section not only enacted what was the amount of punishment for particular offences, but it vested the Court which should sentence the offender with power to award transportation of not less than seven years, instead of awarding sentence of imprisonment. It went out of the ordinary course adopted in other parts of the Code, and, instead of merely defining the punishment, gave a certain power to the Court which should pass the sentence to award a different kind of punishment from that specified in the Code. My honorable colleague, Mr. Justice Louis Jackson, has referred to the Penal Code, as it was originally prepared by the Law Commissioners, for the purpose of showing that, under that Code as it was prepared, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but that the power was given only to the Government of the Presidency. He points that out to show that, under the Penal Code as originally prepared, the power of passing sentence of transportation, instead of imprisonment, was vested in the Government, and not in the Courts. There was a very good reason for that, and for the alteration which took place in the Penal Code when it was finally settled. At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no Native should be sentenced to transportation for a period less than life, it being the opinion at that time that a Native, if once transported, should never be allowed to return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as a punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years for transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable that Natives of India, as well as Europeans and others, should be sentenced to transportation for periods less than for life, and that the reason for not allowing a Native who had once been transported to return to India no longer held good; and therefore as the Penal Code, as prepared by the Indian Law Commissioners, did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact a general clause that, in all cases in which an offender should be punishable with imprisonment for seven years or upwards, the Court should have power to sentence him to transportation instead of imprisonment, provided the term should not be less than seven years, and should not exceed the term for which the offender should be liable to imprisonment. That is the reason why Section 59 was introduced. It necessarily gave power to a Court which could sentence a prisoner to seven years' imprisonment, to sentence him to seven years' transportation in lieu of it; but it never intended to give power to a Court which could not sentence to imprisonment for more than two years to transport for seven. It appears to me to follow that, as the Deputy Commissioner is a Court which has the power of sentencing to imprisonment for seven years, he has power to sentence to transportation for a period not less than seven years.

It is said that if this construction be put upon Section 59, then in every case in which a Magistrate tries an offence punishable with seven years' imprisonment, although that Magistrate could not sentence to the full extent of imprisonment, he would have the power, instead of sentencing him to two years' imprisonment, to sentence him to transportation for not less than seven

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years. It appears to me that that would be a most unreasonable and forced construction of Section 59, and that such a construction ought not to be put upon it. If a man is convicted before a Magistrate of an offence which is made punishable by the Penal Code with seven years' imprisonment, the offender is not punishable with imprisonment for seven years, because, upon that conviction, there is no one competent to punish him with seven years' imprisonment, a Magistrate not having power to imprison for more than two years. The words of Section 59 are:—"Every case in which an offender is punishable, and not every person convicted of an offence which, by this Code, is punishable," &c. The meaning of the Section clearly is that, where the prisoner is punishable with imprisonment for a term of seven years, it shall be competent to the Court which has power to sentence him to that punishment, to sentence him to transportation instead of imprisonment.

In this view of the case, a Magistrate would not have power to transport. It never could have been intended to give power to a Court which has not the power to sentence to imprisonment for more than two years to transport for seven.

It would not be within either the words or the spirit of the Section. Under these circumstances, it appears to me that the Deputy Commissioner had the power to pass sentence of transportation for seven years; that the Judicial Commissioner came to a right conclusion in telling him that he had that power; and that he was right in passing that sentence. Consequently the sentence must be affirmed.

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HIGH COURT CIRCULARS AND LETTERS.

HIGH COURT, &c., CRIMINAL SIDE. Before *Loch*, J.

Offences relating to marriage not being triable under Chapter XV of the Criminal Procedure Code, cannot be admitted to compromise in Court under Section 271 of that Code, though they may legally be compounded out of Court.

LETTER No. 122.

To

THE SESSIONS JUDGE OF

Dated Calcutta, the 20th January, 1868.

In acknowledging the receipt of your letter, dated the 7th instant, to the effect that the sixteen cases shown under heading 61, *viz.*, offences relating to marriage, were admitted to compromise by the Magistrate under Section 271 of the Code of Criminal Procedure, I am directed to request that you will be so good as to inform him that, though an offence, under the above heading, may be compounded out of Court, and the parties do not, by making such composition, commit an offence punishable under the Penal Code, as they would do for compounding any offence not falling within the exception to Section 214, Penal Code, yet, as offences relating to marriage do not come within the provisions of Chapter XV of the Code of Criminal Procedure, the Magistrate cannot permit a case of the kind to be withdrawn under the provisions of Section 271, but he should proceed with the case; and if no one appears, or if any one appearing, declines to prosecute, the Magistrate should dismiss the case.

FEBRUARY, 1868.

A. GROTE AND H. T. TREVOR, ESQRS.

Erratum.

The word "not" should be inserted in the 5th line of the 2nd paragraph at page 170 of the Board's Rules after the words "of this description were," and before "to be considered."

No. 1.

The following should be substituted for the sentence beginning "When a proprietor" at line 10, Rule 4, page 210 of the Board's Rules:—"When a proprietor requires copies of maps of portions of his own estate, or extracts from the Registers relating to his own estate, the copies may be on unstamped paper, but cannot be authenticated with reference to Article 32, Schedule A, Act X of 1862. The application should be on one-anna stamp."

No. 2.

The following general order is published for general information, in cancellation of Circular No. 3 of September, 1867.

From A. H. HARINGTON, ESQ., Officiating Under-Secretary to the Government of India, Home Department, to the Secretary to the Government of Bengal, No. 78, dated Fort William, the 26th November, 1867.

1.—Whether public Officers are prohibited from keeping their salaries in the hands of Government Treasurers.
2.—Whether Government Treasurers should be prohibited from engaging in private business.

The undersigned is directed to request that the endorsement from the Home Department, No. 3494, dated the 16th August, forwarding a communication from the Financial Department, regarding the questions marginally noted, may be considered as cancelled, as it was issued under a misapprehension of the intentions of the Financial Department.

No. 3.

As it has been found in practice that hydrometers are not properly preserved by the process of washing and wiping, as prescribed in Clause 35, page 69 of the Board's Rules, that rule is amended as follows:—

For the sentence "In order to retard," &c., substitute the following:—

In order to retard this deterioration to the utmost, the hydrometers after use should be merely very slightly shaken; and if water is used at all, the instruments should be simply dipped into it, and *not washed.*

No. 4.

In view to promote expedition in the distribution, as rewards, of fines, &c., realized in cases prosecuted under the Excise Laws in the Districts of the Lower Provinces, the Board have approved of the suggestion made by the Accountant General of Bengal, to dispense, in future, with the countersignature by the Commissioner of bills for the payment of such rewards.

2. The charges on account of excise rewards will therefore in future, be admitted by the Accountant General "on receipts of the payees, supported by certified copies of the Court's order in each case."

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular A[illegible] first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	
Wednesday ...	Ditto ... Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given and a list made out ...	Miscellaneous Appeals.	If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following [illegible] or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	
Friday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter ... Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

NOTE.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
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Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
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Looking next to Section 10, Regulation XIX of 1793, (one of those laws passed on the 1st of May, 1793,) I can only read the declaration there to be in terms that grants made after 1st December, 1790, of land exempt from the payment of revenue, are null and void; and further, I hold that a grant which transfers a portion of an estate without any rents to be paid, which rents are recognised means from which the zemindar is to pay Government revenue, and thus form the basis of revenue, is such a grant as is contemplated by this Section X to be null and void.

I can, moreover, only read Section X, Regulation I of 1793, which is to the effect that in cases of transfer by public or private sales, or otherwise, of land in the estate in which the permanent assessment is fixed, a proportionate assessment of revenue is required to be assessed, as meaning that no land shall, in fact, be rendered exempt by any act of the landowner from revenue, that is, from bearing its proper quota of assessment. Its not bearing that quota would be the practical result when a grant is made without any rent, which rent forms the basis of that quota.

The permanent settlement rested, in my opinion, on that basis, *viz.*, that the rents the zemindar might collect should afford him the means of paying the Government revenue. The settlement of 1793 certainly regarded the apportionment of the zemindar's share, and the share of Government in those rents as the mode by which it was originally determined what should be paid to Government as public revenue, and what remains as profit to the zemindar. I do not see that the basis of the contract in the permanent settlement on this point was altered, or how it was so; for, although the Government by the permanent settlement transferred its proprietary rights to the new class of zemindars, still the rents to be collected by the zemindar were rents, on the existence and assessment, and distribution and realization of which the permanent settlement rested; that is, if these rents were to cease to exist, or to be realized by the zemindar by transfers of lands of his estate rent-free, then the accident of the landholder having private funds, and his willingness to use them to pay Government revenue, or else a sale, was the only security for the Government revenue of the estate.

I take it that it is not denied that the security of the Government revenue was an essential part of the contract between Government and the new zemindars in 1793, and I hold that a stipulation restoring wasteful grants by zemindars to third parties (as the grantees are in this case) was one of those stipulations. In my opinion, this was the particular object of Section X, Regulation XIX of 1793.

That Government had ever in mind that the private funds of zemindars were no security for the Government revenue, and that the zemindars' improvidence had to be restricted and watched, and that there was risk to Government in raising them from collecting agents to a new class, as they were liable to be influenced by Brahmins, and by other motives, to make wasteful grants, is, I think, clear from the Regulation passed on the 1st May, 1793, especially from the preamble of Regulation 44 of 1793.

But it is said that the public sale for default provides ample security for the Government revenue. It is true that now, in most cases, the balance due is recovered by the sale. But this was not always so; and at one time, some thirty years ago, sales were but too numerous and much deprecated. Further, Government, in many instances, did not then realize the balance of revenue by sale.

Though, however, I look upon the sale for arrears of Government revenue as undoubtedly the great security, still it was the extreme measure to be resorted to for the realization of the balance of public revenue; and I cannot read the enactment passed on the 1st May, 1793, as a whole and as one code (as we are required to read them) without coming to the conclusion that, while the law provided the sale as such ultimate measure, it primarily looked to avoid such sales and keep the zemindars safe in their estates, by restricting the power of the zemindar to waste the assets by improvident grants of lands without rent,

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and that because such acts left the zemindar without the assets available from his full rents to pay the Government demand of his estate.

It is not denied that Government did not only look to the next generation as being liable to suffer by grants of land exempt from revenue. The Regulations of 1793 indeed expressly refer to the risk of estates being deteriorated by the improvidence of the first generation of zemindars. It is not denied too that the limitation of leases to periods of ten years was continued from the decennial to, and through, the permanent settlement, and did 'not' cease with that up to 1812.

It is said that the permanent settlement made the zemindar an absolute proprietor. But can he be properly so called, if he could not, under the permanent settlement, make leases for as long periods as he pleased? Yet it is said he could grant away land exempt from rent in perpetuity, because he was an absolute proprietor.

It is argued that a lease for a nominal rent for ten years contained as much means of deterioration of assets as if the zemindar could absolutely transfer, *i. e.*, if he could let for ten years at a nominal rent, he could thus as completely divest himself of assets to which Government looked as enabling him to pay the Government revenue, and could default as injuriously for Government as if he made grants in perpetuity exempt from the payment of rent. But it may be fairly answered that restriction and limitation to ten years' leases in the permanent settlement was, in fact, a very strong restriction and limitation of proprietary rights; and, further, that there would have been no restriction to ten years in the matter of leases had it not been thought that the revenue would be jeopardized by such leases on nominal rents if made in perpetuity. If then by the smaller matter of leases this jeopardy was contemplated, would not the still larger power of perpetual grant exempt from rent, much more jeopardize that revenue by direct failure of assets, from failure of rents which before the grant would have been paid to the grantor, and have been a sure fund to enable him to pay the Government revenue? I may also add that the short period of ten years left the Government free to remedy any injury before it had gone to any great extent. This would not be so with reference to grants in perpetuity.

It is then argued that by these grants there is no exemption of the zemindar from liability for the public revenue, and that the proprietor, as absolute proprietor and master of his own property by the permanent settlement, would have still just as much public revenue to pay as if he had made no grant of land free of rent.

It is also strongly pressed on us that the sale laws provide full security and remedy. But I have always understood that it was the object of the Legislature from the period of passing the Regulations of 1793, to that of passing Act XI of 1859, to keep zemindars in possession of their properties, and therefore to avert, and not to resort or look to public sales of estates as the first or best means of obtaining the payment of Government revenue.

Now, if the zemindar may make any grants in perpetuity, saying to the grantee,—"You shall pay me no rent for this land, although I, of course, must pay the proportion of Government revenue assessed on it, and I must pay it by any means I can, and I know not what, instead of from the rents I should ordinarily have as a sure resource from the land now granted rent-free to you,"—will public sales be averted or precipitated?

Let us take a practical illustration. Say a zemindar in 1793 had an estate of 1,000 beegahs charged with a payment of public revenue of 1,000 rupees. He has no private means at all, or, having them, he chooses to spend them in other ways than paying Government revenue from them. Four Brahmins ask him for grants of 4 parcels of lands of 100 beegahs rent-free, or 400 beegahs rent-free, but from which the grantor hitherto collected rent of 100 rupees from each, or 400 rupees. The grants are made. The zemindar no longer realizes the 400 rupees from the 4 parcels of lands. He runs short by 100 rupees of the means he had to pay the public revenue. He defaults in consequence, and then the estate is sold, and thus only is the balance due to Govern-

ment realized. Multiply this one case by the number of zemindars so influenced by Brahmins in 1793, and by the same consequences of sales in each case, would then all those numerous sales be the result contemplated for the welfare of the zemindars, then first created proprietors by that Government which made the laws of the settlement of 1793? I certainly think not, and therefore I contend that the words of the Legislature represent their intention when they prohibited grants exempt from revenue, and looked to other very distinctly laid down restrictions and stipulations in their Code of 1793 (and not to sales alone) for retaining the assets, *i. e.*, the rents, that safely and surely were available to zemindars to pay the public revenue, and also to leave a profit for themselves.

It is then said that there can be no insecurity from deterioration of assets by grants rent-free, because not only will the sale realize all balances, but by it the estate start afresh free of all circumstances, and with all its former assets available to the purchaser. But if the revenue sale be the great security of Government in order to give a purchaser such an estate, can it not be fairly said that the prohibition of the law of such grants being made rent-free, and declaring their invalidity if so made, is the security the Government primarily looked to, in order to avoid the extreme measure of sale, and the consequent ouster of the zemindar whom it was the great object of Government to retain in his lands?

Now, it is clearly admitted that, *quoad* Government, no rent-free grant is valid, and all under-tenures fall by a sale for arrears of Government revenue. The reason is that Government must give the purchaser the estate as it was at the date of the permanent settlement.

But as to third parties, grantees, Section 10, Regulation XIX of 1793, refers in terms to the security of the public revenue being effected by grants of lands to such grantees exempt from payment of public revenue, and prohibits them. If then a sale were the only thing to which it was desired to have recourse in order to obtain this security, why has this further provision been enacted at all in the stringent terms it has been? and why are the evils and risks arising from the character of the then zemindars so fully set forth in the preamble of Regulation XLIV of 1793?

Again, I would observe that this same legislation of 1st May, 1793, provides large means for the zemindar to be assisted in collecting his rents, in order that he might pay from them the Government revenue. If a grant be made rent-free in such a way that no Government revenue is supplied from rents, because the grant rent-free removes all those rents of that portion of the estate so granted which would otherwise go to pay the Government revenue, what is the use of so much care and provision for the collection of the rents of the remaining portion, which is said to be the profit left to the zemindar, and with which Government declared they had no concern?

It is also said that not each beegah, but every beegah of an estate is liable to bear its quota of the burden of the Government revenue. But if a portion of an estate be granted free of rent, surely each beegah of that grant is included in the estate, of which every beegah has to bear its portion of burden for rent, and for which it is hypothecated for its quota of the Government revenue; and thus, whether it be the assets of each beegah, or of every beegah, which enables the zemindar to pay the Government revenue of the estate, it is the fact that by such grants rent-free (and they may be for any portion of the whole estate, however large) that portion is, in fact, unhypothecated, and the revenue unsecured, except by sale.

On all these reasons, I cannot but think that all the Regulations of 1st May, 1793, show that the legislation of that day was so extremely doubtful of the strength and stability of this newly-created class of proprietors, if left to take care of themselves, and without the legislative prohibitions as to wasteful grants which deprived them of those rents from which the demand for the public revenue was to be met, that, for that reason, they clearly and stringently imposed these restrictions.

Reference has been made to the power given to zemindars absolutely to

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resume invalid lakhiraj grants under 100 beegahs. Previous to the permanent settlement Government treated these, when resumed, as khas Government properties. When the contract of 1793 was made, and the power was given to the zemindars to resume and manage these lands under 100 beegahs, it was done (just as in the case of the 50 bighas of the more recent resumption days) because it was not worth while for the Government to resume and collect from such small scattered properties, and make them khas estates. The lands were topographically in one estate, and they were thrown in by Government to add to the zemindar's resources, and to enable him to have more rents wherewith to meet the demands of Government revenue.

As to the point that a grantor cannot repudiate his own grant, I of course fully admit the maxim as a legal one; but I still am forced to say that Section 10, Regulation XIX of 1793, read with the other laws of the 1st May, 1793, does not provide for the contingency, and however much one may regret a hard case, our duty is not to consider the hardness of the case, nor to supply the omission of the regard of the legal maxim cited, but to interpret and apply the laws according to the terms used, taken in their ordinary sense.

Referring, lastly, to the precedents, I think that the late Sudder Dewanny Adawlut case, *viz.*, 1855, page 395, and Shejautoollah's case, 1848, page 462, bear out the view taken by me by the terms used in those decisions; and if we were to admit that a dissentient Judge's judgment is to outweigh that of two others, the whole recognized system in regard to what is a precedent would be subverted.

Regarding, then, the preamble of Regulation XLIV of 1793 and its text, together with Section 10, Regulation XIX of 1793, and looking to the facts of the status of zemindars in 1793, and the reasons I have given, I can only come to the conclusion that no landowner, nor his representatives, as a perpetual holder, (such as a mouroosee ijaradar here) could make valid grants of lands in perpetuity out of his perpetually settled estate exempt from rent, and that the heirs and purchasers may resume them, because invalid by law.

I therefore generally concur in the present judgment of Mr. Justice Norman and Mr. Justice Seton-Karr, and in the recorded opinions of Mr. Justice Trevor, Mr. Justice Campbell, and Mr. Justice Shumboo Nauth Pundit.

I would answer the Division Bench accordingly.

Peacock, C. J.—This case is a very important one, not on account of the value of the property at stake, for that is small, but on account of the principle involved in it.

The question which is asked by the Division Bench is—"How far the grant for valuable consideration by a zemindar of a specific portion of land, to be held without payment of rent, is valid as against the heirs of the grantor or purchasers by private sale of the estate?" It is contended, on the part of the plaintiff, that such grants are grants to hold land exempt from the payment of revenue within the meaning of Section 10, Regulation XIX of 1793, and are consequently void, and that the heirs of the grantor, or a purchaser from him by private sale, are entitled to resume the lands and to treat the grantee as a trespasser. Such a construction of Section 10 would be, in my opinion, contrary to the intention of the Legislature, and at variance with every principle of justice.

The case was originally referred to a Full Bench consisting of the Chief Justice, Mr. Justice Louis Jackson, Mr. Justice Sumbhoo Nauth Pundit, Mr. Justice Levinge, and Mr. Justice Elphinstone Jackson. It was argued at full length, and the point being a very important one, the Court took time to consider its judgment.

The Judges at that time were not agreed in opinion as to the decision to be pronounced. Before judgment could be delivered, two of the Judges, *viz.*, the Chief Justice and Mr. Justice Louis Jackson, were obliged to leave India on account of their health under medical certificate. During their absence, another case of a similar nature was referred to a Full Bench consisting of the

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Officiating Chief Justice, Mr. Norman, and Justices Trevor, Loch, Sumbhoo Nauth Pundit, and Levinge. The case was decided on the 9th of January, 1865, just before my return to India. The actual decision of that Full Bench ultimately turned upon another point, *viz.*, that the rent-free grant was for the purpose of digging a tank, from which some of the villagers in the estate were to have a right to take water. Two of the Judges considered that that fact did not make any difference, and that the grant was void. Two of them thought that the grant being for the purpose of digging a tank, from which the villagers were to have a right to take water, was not void.

The majority of the Judges, however, with the exception of Mr. Justice Levinge, expressed an opinion, not necessary for the decision of the case then before them, that rent-free grants made by a zemindar after a permanent settlement are void. Mr. Justice Levinge, who, after the hearing of the case before the first Full Bench, agreed with me in the view which I then took of it, held that such grants were not void. I regret to say that that learned Judge was prevented by illness of a serious nature from ever taking his seat upon the Bench after my return from England, and death soon afterwards deprived us of his valuable assistance as a colleague.

Under these circumstances, I did not consider it just to act upon the opinion of the majority of the Judges of the 2nd Full Bench in a case in which the present appellant had not been heard, and which was not referred until after his case had been argued before the 1st Full Bench.

I therefore thought that the present case ought to be re-argued before a Full Bench consisting of nine Judges; and the other Judges concurring in that view, I appointed a Full Bench of nine Judges to hear it. Of that Full Bench, two, *viz.*, the Chief Justice and Mr. Justice Louis Jackson. were on the 1st Full Bench; two, *viz.*, Mr. Justice Trevor and Mr. Justice Norman, were on the 2nd Full Bench; one, Mr. Justice Sumbhoo Nauth Pundit, sat on both of the Full Benches; and the other four Judges were not members of either of them.

The case was fully and ably argued before the nine Judges, but they could not agree in opinion, and consequently the Court took time to consider. The Judges afterwards met, but they could not then agree as to the answer which ought to be given to the question. The point was not finally discussed at that meeting; but as there did not appear to be any reasonable ground for supposing that the Judges would ever come to a unanimous opinion, it was then arranged, as I understood, that such of the Judges as might wish it should put their opinion into writing; and although I cannot say that it was so expressly stated, I fully understood that anything that was to be written was to be circulated for the consideration of the other Judges of whom the Full Bench was composed, in order that, after considering the reasons which might be adduced on either side, the question might be fully and thoroughly discussed at another meeting, and that the Judges, if they could not then agree, should deliver their judgments *seriatim*.

Soon after the departure of Mr. Justice Trevor for England, I discovered that some of the Judges had expressed their opinions in writing, and had sent them into the office of the Registrar without informing me, and I believe, I may say, without informing any of the other Judges of their intention to do so. They probably considered that their written opinions were their final judgments in the case; but I cannot treat them otherwise than as arguments and minutes of the judgments which they proposed to deliver. Amongst the number of the Judges who sent in their opinion were the late Mr. Justice Shambhoo Nauth Pundit, whose death we all lament, and Mr. Justice Trevor and Mr. Justice Campbell, both of whom have since retired from the Bench. The opinion of Mr. Justice Trevor is dated the 9th April last, only 14 days before he retired.

I am informed that, according to the practice of the late Sudder Court, the views so expressed in writing, and sent in to the Registrar's Office, would have been considered judgments. All the opinions thus expressed are in favor of the heirs' right to resume, and differ from that which I entertain; and this

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circumstance renders it an unpleasant duty for me to declare that, in my opinion, they cannot be considered as judgments, but merely as memoranda of arguments to be adduced. This is not a mere technical objection, but it is founded upon a fundamental principle essential to the due administration of justice, that every judicial act which is done by several Judges ought to be completed in the presence of the whole of them.

This is not the first occasion upon which I have been called upon to express my opinion upon that subject. I have done so several times, and in one case in particular which has been reported (*see* Regular Appeal No. 164) in 2 Wyman's Reporter, Civil Rulings, p. 326.

I then stated that, in my opinion, a final judgment ought not to be pronounced by a Court consisting of several Judges in a case in which they differ, until by conference and discussion they have endeavoured to arrive at a unanimous judgment; and I then cited authorities for the opinion which I expressed.

If, after discussion, and after deliberately weighing the arguments of each other, the Judges cannot agree, their several judgments ought to be delivered in open Court in the presence of the others.

It would not have been lawful, nor would it have been even seemly, for each of the Judges who sent his written opinion in to the Registrar's Office, to have gone separately into open Court without communication, or even after communication, of his intention to the other Judges, and to have read out as his final judgment the contents of the memorandum which he sent in to the Registrar's Office.

If each of the Judges who composed the Full Bench could not have gone separately into Court, and, in the absence of the others, have read out his own judgment, without hearing the arguments which each of the other Judges, who were associated with him as members of the Full Bench, might adduce to alter his opinion, he could not lawfully deliver a separate judgment at a separate time, by handing in to the Registrar as his judgment a separate paper signed by him, containing his written opinion. The mere arguments and expressions of opinion of individual Judges who compose a Court are not judgments. A judgment, in the eye of the law, is the final decision of the whole Court. It is not because there are nine Judges that there are nine judgments. When each of the several Judges of whom a simple Court is composed, separately expresses his opinion when they are all assembled, there is still but one judgment, which is the foundation for one decree. If it were otherwise, and if each of the memoranda sent in on the present occasion was a judgment, there would be nine judgments in one case, some deciding one thing and some another, and each Judge would have to review his own judgment separately, if a review should be applied for.

In a case which was heard before Mr. Justice Bayley and two other Judges in 1864, my honorable colleague made the following remark:—"As I shall probably have gone on leave before the judgment of my colleagues will have been given in this case, I leave my note of my view after hearing Counsel." In that case, which is reported in the Special Number of Sutherland's Weekly Reporter, page 148, the Judge very properly recorded the note which he left merely as an expression of his opinion, and not as a judgment.

This was my impression from the wording of the memorandum; but from what my honorable colleague has stated to-day in Court, I find that he did intend it to be a judgment, and that I was under a wrong impression.

In a very recent case in the Exchequer Chamber in England (Brand *versus* the Hammersmith and City Railway Company, Law Reports, Common Law Series, Vol. II, part 4, pp. 223 and 235), the Court, after argument, took time to consider. The Chief Justice of the Common Pleas prepared a written judgment to be delivered, but other members of the Court were not then prepared to give judgment. Before judgment was delivered, the Chief Justice resigned. The other Judges differing in opinion, the judgment which the

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Chief Justice had prepared was treated merely as an expression of his views, and not as a judgment.

I cannot say that the Judges who have expressed their views of this case might not have changed them upon discussion with the other Judges who were associated with them as members of the Full Bench. I cannot suppose that, when they sent in their opinions in writing to the Registrar's Office, they considered that they had so far recorded their final judgments, that they had not the power to change their opinions, however they might be influenced by the arguments of their colleagues; nor can I believe that they were so wedded to their opinions that they would not have been ready to change them if they had been convinced that they were wrong.

The minutes sent in may be valuable as memoranda containing the opinions and arguments of the Judges who expressed them, and I have read and considered them very carefully. It appears to me that they ought to be filed, so that the parties, if they should obtain leave to appeal, may have them transmitted to Her Majesty in Council, in order that the Lords of the Council may have the benefit of the arguments and opinions expressed, and may treat them as judgments if they should hold that they legally had that effect.

Unfortunately, a succession of circumstances, over which we have had no control, have caused considerable delay in this case; but as execution has not yet been issued, and the defendant is still in the possession of the lands of which he and those under whom he claims have been in the peaceable and undisturbed possession for nearly fifty years, it is some consolation to know that the delay which has occurred has not been productive of injury, but has merely stood in the way of a plaintiff who was endeavouring to enforce an unjust and an unrighteous demand.

The question referred in appeal No. 253 of 1868 involves a most important point, *viz.*, whether a zemindar, who for valuable consideration sells land either absolutely or for a term of years without receiving any rent, or the heirs of such zemindar or purchaser by private sale from him, can treat the grant as void, and resume the lands.

As a similar question has been raised in special appeal No. 1116 of 1852, the pleaders in that appeal have also been heard before the Full Bench.

The question relates to grants made since the 1st December, 1790, and to lands included in, and forming part of, the mal lands of a permanently settled estate, for the revenue of which the zemindar has engaged and is liable to Government, and for the arrears of which the whole estate is liable to be sold.

The question raised is, not whether the grant would be void as against a purchaser at a sale for arrears of Government revenue, but whether the grantor himself, or his heirs, or any person claiming under him, can treat the grant as void and turn the purchaser out of possession, or assess the lands at a full rent, notwithstanding they have been sold rent-free. The two questions are very different.

There can be no doubt that grants rent-free are void as against a purchaser for arrears of revenue, unless they fall within any of the exceptions in the Sale Laws.

When a landlord re-enters and voids a lease under a clause of forfeiture for non-payment of rent, or for breach of covenant, the title of the lessee is at an end, and all leases or other incumbrances created by him fall together with the lease out of which they were created. So also, in the case of a sale for arrears of revenue under the power of sale expressly reserved to Government by the Sale Laws, all leases and incumbrances, with certain exceptions, are void as against a purchaser. If this were not so, the power of re-entry in the case of a landlord, and the power of sale for arrears of revenue, might in all cases be rendered valueless by means of rent-free grants or leases, or other incumbrances, for the whole or greater portion of the estate created by the lessee or zemindar during the continuance of his lease, or of his proprietary right in the estate.

The cases are very different from that of a vendor's treating his own grant as void, and taking away from the purchaser that which he has sold to him.

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A purchaser for arrears of revenue does not claim through the zemindar whose estate is sold, but through the Government under a power of sale adverse to the zemindar. (*See* Section 5, Regulation XLIV of 1793, amended and altered by subsequent Regulations and Acts, of which the last is Act XI of 1859.)

Persons who purchase or take leases from a zemindar are cognizant of the Sale Laws, and are fully aware of the risk which they run, and that a zemindar cannot convey a title which will stand good against a purchaser for arrears in default of payment of revenue.

In dealing with this case, I refer to Regulation XLIV of 1793, because it formed part of the same Code as Regulation XIX of 1793, and was the Sale Law which existed under that Code. In construing one of the Regulations of that Code, we cannot consistently take into consideration any Regulation which was passed subsequently.

The question turns upon the construction of the words in Section 10, Regulation XIX of 1793—"all grants for holding land exempt from the payment of revenue."

Some of the Judges hold that those words include grants or leases by a zemindar to hold exempt from the payment of rent. In my opinion, the word "revenue" is used in its ordinary and proper sense, and refers only to grants for holding free from the payment of revenue to Government.

The Officiating Chief Justice (Mr. Justice Norman) in the 2nd Full Bench considered that, as a right was by the grant then under consideration reserved to some of the villagers of the estate to take water from the tank, for the construction of which the grant was made, the water might be considered as the produce of the land, and that the right to take it was in the nature of a reservation of rent in kind. But the other Judges did not concur with him in that view; and, with all deference, I am clearly of opinion that if it was necessary to reserve rent in order to prevent the grant from being void as a grant for holding land exempt from the payment of "revenue," the right reserved to the villagers to take water from the tank was not a reservation of rent, and it was still less a reservation of revenue. If the right of the villagers to take water from the tank was Government revenue, it was a kind of revenue which was wholly useless to Government, and could not assist them in meeting the necessities of the State; and if it was rent, it could not assist the zemindar in providing for the payment of the revenue.

In the case now under consideration, one of the grants was an absolute grant to the grantee and his heirs for digging a tank; one was an absolute sale of land to the grantee and his heirs for the purpose of building a house; and others were sales of land generally to the grantee and his heirs. It is clear that if a reservation of rent were necessary, the erection of a dwelling-house on the land granted for that purpose could not amount to a payment of rent or revenue, whatever opinion may be entertained as to the water of a tank. As to the grant, therefore, for building a house, if the Judges, who consider that a grant to hold free from the payment of rent to the zemindar or his heirs is a grant to hold exempt from the payment of revenue, and is therefore void, and that the grantor or his heirs may treat the grantee as a trespasser, are correct in their view of the law, the plaintiff is entitled to recover the lands which were sold by his ancestor, and upon which the purchaser has expended his money in building a house. Such a grant would be binding even upon a purchaser under a sale for arrears of revenue,—Regulation XLIV of 1793, Sections 5 and, 8; and with all respect for the opinion of my honorable colleagues, I have no doubt that it is also binding upon the grantor and his heirs. It would be a great anomaly if such a grant were binding upon a purchaser at a sale for arrears of revenue, and not binding upon the grantor himself or his heirs.

I must admit that, before a revenue settlement, the Government's share of the produce of every beegah of land in cultivation, or the rents paid in lieu of it, was treated as revenue.

In the report of Messrs. Anderson Crofts and Bogle, the Commissioners appointed by Government in 1776 to collect materials for the settlement, and of which an extract is set out in Harington's Analysis of the Regulations, Vol. II, page 58, it is said: "Amongst all these various sources of revenue and profit, those which issue out of land form so capital and important a branch, that, comparatively speaking, the revenue of Bengal may be said to consist of land rent."

It is true that Mr. Harington objects to the indefinite use of the word "rent," and that in another part of the report it is said—"Almost all the lands of Bengal are held under some person who collects the rents, pays the revenue, and stands between the Government and the immediate tenant of the soil."

However indefinitely and inaccurately the word "rent" may have been used before the permanent settlement, and whatever may be the correct theory as to the proprietorship of the lands previously thereto, it is clear from the recitals in Regulation XIX of 1793, and in several others of the Regulations of the Code of which that Regulation formed a part, that the Government claimed to be entitled to a proportion of the produce of every beegah of land in cultivation, demandable in money or kind (according to local custom), "unless it transferred its right thereto for a term or in perpetuity, or limited the public demand upon the whole of the lands belonging to an individual." This was the basis upon which the permanent settlement was founded.

If Government made a lakheraj grant for a term or in perpetuity, it transferred to the grantee its right to a share in the produce of the lands during the existence of the grant. If it made a temporary settlement with a zemindar, it limited the public demand upon the whole of the lands included in the settlement to the amount of revenue which the zemindar engaged to pay for such lands during the continuance of the settlement.

In cases in which there was no valid lakheraj, and no temporary revenue settlement, the rents or share of the produce payable by the occupiers of the land were treated as revenue belonging to Government.

When a temporary settlement was made with a zemindar, he could not enter into any engagement with dependent talookdars, under-farmers, or ryots, beyond the period of his own engagement with Government. (*See* Regulation XLIV of 1793, Section 1.)

So long as that state of the law continued, any grant to hold lands free from the payment of rent, which included the Government's share of the produce, beyond the period of the zemindar's engagement, was, no doubt, treated as an invalid lakheraj grant, whether such grant was, according to its language, to hold free from the payment of "revenue," or free from the payment of "rent."

In the Regulation of the 1st December 1790, grants to hold land "rent-free" are treated as lakheraj grants or grants to hold land "exempt from the payment of revenue to Government."

If such grants had been binding upon Government, after the expiration of the zemindar's temporary engagement for revenue, the aggregate of the rents, upon the estimate of which the amount of revenue would have had to be fixed at the next revenue settlement, would have been from time to time reduced, and, doubtless, would soon have dwindled to nothing.

It is not necessary for the present question to determine whether before the permanent settlement the zemindars were proprietors of the soil or not. It is clear that they could not make grants for holding lands free from the payment of that proportion of the produce which was payable in money or kind to Government, and that the Government or their duly authorized officers were alone capable of making such grants. The Government always assumed and exercised the power of making lakheraj grants at their pleasure; and after such grants, the lands were exempt from payment of rent to the zemindars.

A great change, however, was effected by the permanent settlement.

The two fundamental measures which were declared to be essential to the objects which the Government had in view in settling the lands permanently,

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were that the soil should be vested in the landholders, and that the revenue should be fixed for ever. (See Regulation II of 1793, Section I).

Regulation VIII of 1793, Sections 4 and 5, laid down rules as to who should be considered the actual proprietors of the soil and entitled to engage with Government for the revenue. If that had not been done, there would have been great difficulty in determining who had the proprietary rights. Those who paid revenue immediately to Government at the time of the decennial settlement, were ordinarily considered to have the proprietary rights, and were allowed to engage with Government for the revenue to be paid in perpetuity for their lands; and the lands for which such engagement was entered into, were called an estate.

I shall henceforward use the word "estate" in the sense in which it is defined in Section 2, Regulation XLVIII of 1793, *viz.*, "land subject to the payment of public revenue for the discharge of which a separate engagement has been entered into with Government."

As soon as an engagement for a permanent settlement was entered into, the amount payable to Government, and that alone, was the Government revenue, and the unpaid kists or instalments of that amount were alone treated as arrears of revenue. (See Regulation XIV of 1793, Section 2).

The rents payable for the lands by the occupiers or cultivators were vested in the zemindars as proprietors of the soil, and they were expressly authorized, by Regulation XVII of 1793, to distrain for any arrears thereof, and such arrears were termed in the Regulation "the arrears of rent due from their under-farmers, ryots, and dependant talookdars." As soon as an estate was permanently settled, the revenue and rent became perfectly distinct, and were described throughout the Code of 1793 as two separate and distinct things.

The revenue was not payable for each beegah of land. No particular portion of the sum which the zemindar engaged to pay as revenue for the whole estate, was the separate revenue of any particular beegah or portion of the estate. The whole revenue was assessed upon and paid for the whole estate, and every beegah of land in the estate, whether cultivated or not, was liable to be sold for any arrear of revenue. No distinct beegah was liable to be sold separately for any separate or distinct portion of the revenue. The Government had no more power to alienate the zemindar's rents than the zemindars had to alienate the Government revenue.

By Regulation I of 1793, Section 10, the landholders were expressly authorized to transfer by sale, gift, or otherwise, the proprietary rights in the whole or any portion of their estates, and the grantee of the whole of the proprietary rights in portions of the estate was entitled to have the revenue apportioned, and a separate portion of it charged upon the land in which he had acquired the proprietary right, and to hold such land as a separate estate liable only for that portion of the revenue which was assessed upon it.

By Section 52, Regulation VIII of 1793, the zemindars were also empowered to let their lands in whatever way they might think proper, or to grant dependent talooks subject to certain exceptions and to the restrictions contained in that Regulation, which are not material in this case.

Now we find that, in other parts of the Code of 1793, the words "rent" and "revenue" were used to designate two distinct and separate things; and that in Section 10, Regulation XIX of 1793, the word "revenue" was substituted for the word "rent," which had been used in the Regulation of the 1st December, 1790, with reference to the same subject. This of itself is a very strong ground, independently of the sense ordinarily attached to the words "revenue" and "rent," for concluding that the word "revenue" was not intended to be used as synonymous with the word "rent."

The object of the Regulation of the 1st December 1790 and of Regulation XIX of 1793 was the same. Each of those Regulations related to lakheraj lands, or lands exempted from the payment of revenue to Government.

The Regulation of 1st December 1790 was entitled "Regulations respecting lakheraj lands, or lands paying no revenue to Government." Regulation

XIX of 1793 was entitled "a Regulation for re-enacting with modifications the rules passed on the 1st December, 1790, for trying the validity of the titles of persons holding or claiming a right to hold lands exempt from the payment of revenue to Government, not being of the description of those termed Badshaie or Royal," &c

Regulation XIX of 1793 contained the following recital, which shows that the object of it was to prevent unauthorized alienations of revenue payable to Government, and that it had nothing to do with the rents payable to the zemindars:—

"By the ancient law of the country, the ruling power is entitled to a certain portion of the produce of every beegah of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term, or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce, and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zemindar made a grant of any part of his lands to be held exempt from the payment of revenue, it was considered void from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution."

The recital then proceeded to show that numerous grants of the description above referred to had been made. It stated that the Governor-General in Council deemed it incumbent to recover the public dues thus alienated, and pointed out the grounds for legislating in the manner provided by the Regulation with reference to grants already made, and then it proceeded as follows:— "Upon the above grounds, and with a view to facilitate the recovery of the public dues from lands held exempt under invalid grants, as well as to prevent any similar alienations being hereafter made to the prejudice of the public revenue," &c., "the following rules have been enacted," &c.

The Regulation divided the grants intended to be dealt with into three classes:—

1*st*—Those which had been made prior to the grant of the Dewanny (12th August 1765).

2*ndly*—Those which had been made between that date and the 1st of December 1790; and,

3*rdly*.—Those which had been or should be made after the 1st December 1790.

It must be remarked that the same words are used in regard to all the three classes of grants, *viz*, "grants for holding land exempt from the payment of revenue," from which, according to every sound principle of construction, independently of the rule expressly laid down in Regulation XLI of 1793, it ought to be concluded that only grants of the same nature were intended, and that the word "revenue" was used in Section 10 in the same sense as that in which it was used in the title and in the other Sections of the same Regulation.

Grants made prior to the 12th of August 1765 were declared to be valid, subject to certain conditions (Section 2). Grants made between the 12th August 1765 and the 1st December 1790, with certain exceptions not material to this case, as well as grants which had been or should be made subsequent to the 1st December 1790, were declared to be invalid.

There was, however, a great distinction made between lands included in invalid lakheraj grants made prior to the 1st December, 1790, and those which had been or should be included in grants made subsequent to that date; the former were provided for by Section 3 and subsequent Sections; the latter by Section 10.

It is very important to attend to this distinction and to the reason for it, as it clearly explains the meaning of Section 10, and shows why the provisions in respect to grants made after 1st December, 1790, were different from those which had reference to grants made prior to that date.

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The reason for the distinction was this. By the rules for the decennial settlement, it was directed that the assessment upon the settlement of an estate was to be fixed exclusive and independent of all the then existing lakheraj lands, whether exempted from the khiraj, or public revenue, with or without authority.

The rule was re-enacted by Section 36, Regulation XVIII of 1793. That rule, like the rules made for the decennial settlement, did not extend to grants made after the 1st December, 1790. Lands included in any lakheraj grants made prior to that date, whether such grant were made with or without due authority, were deemed to be separated from the estate in which they were situate, and rents thereof were excluded from the estimate, on the basis of which the amount to be paid as revenue under the permanent settlement was fixed. (See Regulation XIX of 1793, Section 4)

If the grants were registered, the lands included in them could not be assessed to the public revenue at all until the grants had been declared by a final judicial decree to be invalid. When such a decree was obtained, and the lands were resumed, they were assessed to the revenue as independent talooks.

If the lands exceeded 100 beegahs, they were held as separate estates under Government, to whom the revenue was declared to belong. (See Regulation XIX of 1793, Sections 4, 7, and 8.) If the lands did not exceed 100 beegahs, the revenue, when assessed upon them, was to belong to the zemindar within whose estate they were situate. (See Regulation XIX of 1793, Section 6.)

Regulation XIX of 1793, Section 4.

Further, although it was declared that the Regulation respected only the question "Whether the lands included in such grants were liable to the payment of revenue, or otherwise," still the grant was considered to have such a *primâ facie* effect as regarded the proprietary rights in the soil, that it was expressly enacted that every dispute between the grantee and the grantor respecting the proprietary right in the lands was to be determined by the Civil Court; and that the grantees or possessors of the lands, until dispossessed by a decree of the Civil Court, were to be considered the proprietors of the lands.

The case was, however, different with respect to grants made after 1st December, 1790, and before a decennial or permanent settlement of the lands included in them. Such grants, having been declared null and void by the Regulation of the 1st December, 1790, and by Section 10, Regulation XIX of 1793, were not lakheraj grants within the meaning of Section 36, Regulation VIII of 1793, or the rule for the decennial settlement, of which that Section was a re-enactment. The lands included in such grants were deemed part of the estate to which they belonged, and the rents of them were included in the assets of the estate, upon the basis of which the Government revenue was fixed, and the lands, notwithstanding the grants, were assessed to the public revenue as part of the estate. The zemindar's engagements for the revenue included such lands, and they, as well as all the other lands of the estate, were liable to be sold for any arrear of revenue.

The lands therefore were not, like the lands included in grants made prior to the 1st December, 1790, held free from the payment of revenue, until the grants should be declared invalid by a final judicial decree, and the lands should be resumed.

It was only reasonable and just when the grants were treated by Government as void as against Government, and no effect was given to them, on fixing the amount of revenue to be paid for the estate, that the zemindars who were assessed and paid revenue for them should be allowed to treat the grants as void as against themselves, and should be authorized to collect the rents of the lands included in such grants in the same manner as they would have done if such grants had not been made.

The grants could not with any justice be held void, as against Government, as regards the assessment of revenue, and valid, as against the zemindars, as

regards the collection of the rents, upon the faith of which they engaged to pay the revenue.

It was not only considered right that the zemindars who had been assessed, and had engaged with the Government for the revenue upon the faith that the grants were void, should, in lieu of the revenue for which they engaged, be entitled to collect the rents of the lands; but it was also considered right that they should have the same summary remedies for collecting these rents as if the grants had not existed, and that they should not be compelled to resort to a Court of law to have the grants declared invalid before they could collect the rents.

No one would have engaged by a permanent settlement to pay revenue to Government for lands included in lakheraj grants subsequent to the 1st December, 1790, if he had not been authorized to collect the rents before the grants should have been declared void by a decree of the Civil Court. No such decree was necessary before the Government could assess the lands; and it was not considered necessary or expedient to require such a decree, as in the case of grants prior to the 1st December, 1790, before the zemindar could collect the rents.

It was therefore enacted by Section 10, Regulation XIX of 1793, that all grants for holding lands exempt from the payment of revenue, which had been made after the 1st December, 1790, or which should thereafter be made, by any other authority than that of the Governor-General in Council, should be null and void, and that no length of possession should thereafter be considered to give validity to such grant, either with regard to the property in the soil, or the rents of it. The Section then proceeded thus:—"And every person who now possesses, or may succeed to, the proprietary rights in any estate or dependent talook, or who now holds, or may hereafter hold, any estate or dependent talook in farm of Government, or of the proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or talook held khas, is authorized and required to collect the rents from such lands at the rates of the pergunnah, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or talook in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any officer of Government; nor shall any such proprietor, farmer, or dependent talookdar be liable to an increase of assessment on account of such grants which he may resume and annul during the time of the engagements that he may be under for the payment of the revenue of such estate or talook when the grants may be so resumed and annulled. The managers of the estates of disqualified proprietors, or of joint undivided estates, are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this Section."

It has been shown that, after a permanent settlement, the Governor-General in Council could not alienate the rents which belonged to the zemindars as the proprietors of the soil. The words "by any other authority than that of the Governor General in Council" in Section 10 were applicable to grants to hold exempt from the payment of Government revenue, but were wholly out of place if the words "exempt from the payment of revenue" are to be read as synonymous with the words "exempt from the payment of rent to the zemindar or his heirs," inasmuch as such a grant would not have been binding if made by the Governor General in Council.

Grants made after the 1st December, 1790, to hold lands exempt from the payment of revenue being void, and the zemindars being assessed by the permanent settlement for the revenue, whether the lands included in the grants exceeded 100 beegahs or not, no such distinction was necessary, with reference to grants made after the 1st December, 1790, between cases in which the lands should exceed, and those in which they should not exceed, 100 beegahs, as was made by Sections, 4, 5, 6, and 7 of Regulation XIX of 1793 in the case of grants made prior to the 1st December, 1790.

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The words "whether exceeding or under 100 beegahs" in Section 10 are clear and intelligible if the word "revenue" is to be read as revenue, but wholly useless and unintelligible if the word "revenue" is to be read as synonymous with "rent."

Further, it was considered right to give a zemindar, who should engage for the revenue, the same benefit of *nullum tempus* as the Government itself should have had as regards grants exempt from the payment of revenue. Hence the use of the words "and no length of possession shall be hereafter considered to give validity to such grants," &c. These are intelligible if the Section is read as applicable to grants to hold exempt from the payment of revenue, but not if the word "revenue" is to be read as synonymous with "rent."

Again, it was fair and equitable that the zemindars who were assessed, and paid revenue for the lands included in their estates, should not only be entitled to the soil and to collect the rents, but that they should have the same power to collect the rents as they would have had if the grants had not been made, and that they should not be driven to a Court of law to declare the invalidity of the grants, either for the purpose of entitling themselves to the rents, or of establishing their rights in the soil.

Consequently Section 10 went on to declare that every person who should possess the proprietary right in the estate should be at liberty to collect the rents from the lands at the rate of the pergunnah, and to dispossess the grantee "of the proprietary right in the land, and to re-annex it to the estate or talook in which it was situate, without making any previous application to a Court of Justice."

Again, it might have so happened that a zemindar would refuse to enter into a decennial or permanent settlement for his estate, or the lands might be let in farm, or held khas, or a zemindar might become disqualified. To provide against these or other contingencies, under which the estate might be let in farm or held khas, Section 10 enacted that any person who might hold the estate in farm of Government, and every officer of Government appointed to make the collections from any estate or talook held khas, and every manager of an estate of a disqualified proprietor, "was authorized and required" to exercise the powers vested in the proprietor.

These words would not be applicable to a lease granted by a zemindar after a permanent settlement to hold lands free from rent, though they were peculiarly applicable to grants made before a permanent settlement.

Mr. Justice Campbell says:—"It seems to me that, in regard to permanently settled estates, if the word "revenue" be taken to mean the revenue payable to Government, the law treats of an impossible thing, and deals with it in a way which means nothing at all. It was quite impossible that a zemindar or any one else could grant away the Government revenue, that revenue having been already definitely fixed in a lump sum payable by the zemindar. To declare such grants invalid would be a most uncalled-for and meaningless provision."

But it must be borne in mind that all the lands in the districts intended to be permanently settled had not been decennially or permanently settled when the Code of 1793 was passed, and consequently it was just as necessary to provide against lakheraj grants which might be made between the 1st December 1790 and the permanent settlement, as it was to provide for the resumption of similar grants which had been made between the 12th of August 1765 and the 1st of December 1790.

It does not follow that, because it would be difficult to evade the new law by making such grants after the 1st December, 1790, that such law was not directed against such grants; otherwise it might be argued that the most effectual law was not directed against the acts which it was intended to prevent, and must be construed to apply to something else, because it had effectually prevented the mischief against which it was directed.

If Section 10 did not extend to grants to hold lands exempt from the payment of revenue made by a zemindar after the 1st December, 1790, and before a

permanent settlement of the estate to which the lands belonged, the Regulation contained no provision against such grants. The real question is not whether, in regard to grants made after the 1st December, 1790, and after a permanent settlement, the words "exempt from the payment of revenue" mean exempt from the payment of revenue to Government, but whether they also mean exempt from the payment of rent to the zemindar.

It appears to me that the word "revenue" as used in the Section means revenue, and nothing else; but that it includes whatever was Government revenue at the time of making the grant to be effected by the Regulation.

If a law should enact that whoever should clip the current coin of the realm should suffer a particular punishment, it would include the clipping of whatever was current coin at the time of the clipping; but it would not include the clipping of anything which was current coin at the time of passing the Act, and which should cease to be current coin before the time of the clipping. So a grant to hold free from the payment of rent would be a grant to hold free from the payment of revenue if made at a time when the rent was public revenue, but not if made after rent had ceased to be public revenue, and had been vested by law in the zemindars as proprietors.

If the construction which I put upon the words of Section 10 is correct, the word "revenue" will be read in its ordinary and natural sense, the provisions of the Section will be natural and consistent with justice, and force and effect will be given to every word in the Section. But if the construction contended for by the plaintiff is the right one, the word "revenue" must be read in two different senses,—one, its natural, proper, and ordinary sense; and the other, a sense in which it is never used, the greatest injustice will be done, and no force or effect can be properly given to a great portion of the words which are used in the Section.

It has been urged that the recital and provisions of Regulation XLIV of 1793 show that it was the intention of Government to restrict the powers of the zemindars and to prevent them from making rent-free grants, in order to protect the heirs of the zemindars, and also the Government revenue.

It appears to me that the argument to be drawn from Regulation XLIV of 1793, so far from being in favor of the construction contended for, is a very strong argument in support of the view which I take of the case.

The recital is as follows:—

"The public demand upon the estates of the proprietors of land, with whom a settlement has been or may be concluded under the original Regulations for the decennial settlement, having been fixed for ever, it is to be apprehended that many proprietors, either from improvidence, ignorance, or with a view to raise money, or from other causes or motives, may be induced to dispose of dependent talooks to be held at a reduced jumma, or fix the jumma of such dependent talooks as now exist in their respective estates at an under-rate, or let lands in farm, or grant pottahs for the cultivation of land, at a reduced rent for a long term or in perpetuity. Such engagements, if held valid, would leave it in the power of weak, improvident, or ill-disposed proprietors to render their property of little or no value to their heirs; promote vice and injustice; occasion a permanent diminution of the resources of the Government arising from the lands, in the event of the rent or the revenue reserved by such proprietors being insufficient for the discharge of the amount of the public demand upon their estates; be an abuse of the great and lasting benefit which has been conferred upon the landholders by the possession of their lands being secured to them in perpetuity at a fixed assessment; and, moreover, be repugnant to the ancient and established usages of the country, according to which the dues of Government from the lands (which consist of a certain proportion of the annual produce of every beegah of land demandable, according to the local custom, in money or kind, unless Government has transferred its right to such proportion to individuals for a term or in perpetuity, or fixed the public demand upon the whole estate of a proprietor of land, leaving him to appropriate to his own use the difference between the value of such proportion

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of the produce and the sum payable to the public so long as he continues to discharge the latter) are inalienable without its express sanction. It is at the same time essential that proprietors of land should have a discretionary power to fix the revenue payable to their dependent talookdars, and to grant leases, or fix the rents of their lands for a term sufficient to induce their dependent talookdars, under-farmers, and ryots to extend and improve the cultivation of their lands, and that such engagements should be held inviolable in all cases where they may interfere with or affect in any shape the primary and indefeasible rights of Government. Upon the above grounds, and as the proprietors of land, previous to the decennial settlement being declared perpetual, were not entitled to enter into any engagements with their dependent talookdars, under-farmers, or ryots for a period extending beyond the term of their own engagements with the public, the Governor General in Council has enacted as follows," &c.

The recital shows—

First.—That the Legislature drew a clear distinction between the Government demand or revenue, and the rent payable to the zemindars.

Second.—That they foresaw that the zemindars, having been declared proprietors of the lands, would probably grant dependent talooks or leases at an under-rate; and that, by doing so, they would render their property of little or no value to their heirs, and occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or the revenue reserved by such proprietors being insufficient for the discharge of the public demand upon their estates.

Third.—That they did not consider that Section 10 of Regulation XIX of 1793 was sufficient to restrain the mischief so contemplated.

No one has ventured to suggest that a grant to hold land free from the payment of all revenue, except a nominal revenue, would not be a grant to hold exempt from the payment of revenue within the meaning of Section 3 of Regulation XIX of 1793.

If the word "revenue" in Section 10 is synonymous with rent, and if a reservation of a nominal rent after a permanent settlement is sufficient to prevent the grant from being rent-free, it seems to follow that the reservation of a nominal revenue in a grant made after the 1st December, 1790, and before a permanent settlement, would be sufficient to prevent the grant from being a grant to hold exempt from revenue. Yet no one, I presume, would contend that a grant by a zemindar, or an unauthorized officer of Government, made before the 1st December, 1790, or after the 1st December, 1790, and before a permanent settlement, to hold lands of large annual value to a man and his heirs for ever at a nominal revenue, would not fall within the words "exempt from the payment of revenue," as much as a grant to hold wholly exempt from the payment of revenue would.

It would be idle to contend that grants in perpetuity, made without the authority of Government at a mere nominal revenue or rent before the 1st of December, 1790, were not invalid lakheraj grants, because they reserved some revenue, and were not therefore grants to hold wholly exempt from the payment of revenue.

As I understand the words "exempt from the payment of revenue" in Sections 3 and 10, Regulation XIX of 1793, they mean exempt from the payment of the whole or any part of that which the grantee would have been bound to pay as revenue in the absence of the grant.

If then Section 10, Regulation XIX of 1793, included grants to hold exempt from the payment of revenue, it operated to prevent grants to hold at nominal or inadequate rents, and Regulation XLIV of 1793 was unnecessary.

If, however, Section 10 did not extend to rent-free grants after a permanent settlement, there was nothing to prohibit such grants.

Now, there were two modes by which the Legislature might have provided against the mischief contemplated by them as recited in Regulation XLIV of 1793.

They might have prevented grants at inadequate rents for long terms or in perpetuity, either by compelling the zemindars to reserve adequate rents on all grants, or by restricting their right to make grants for any term exceeding a fixed period.

The Legislature thought it right to adopt the latter course, and they fixed the term at ten years, and introduced Regulation XLIV of 1793 into the Code for that purpose.

By the 2nd Section they enacted—

"That no zemindar, independent talookdar, or other actual proprietor of land, nor any person on their behalf, shall dispose of a dependent talook to be held at the same or at any jumma, or fix at any amount the jumma of an existing dependent talook, for a term exceeding ten years; nor let any land in farm, nor grant pottahs to ryots or other persons for the cultivation of the lands for a term exceeding ten years."

The Section then prohibited the renewal of leases or pottahs at any period before the expiration of them, except in the last year; and it concluded by declaring "that all evasions of the prohibitions, by entering into two separate engagements, leases, or pottahs at the same time, dating an engagement, lease, or pottah subsequent to the period at which it may have been actually executed, or by any other device, shall be considered as an infringement of them, and every engagement fixing the jumma of a dependent talookdar, and every lease or pottah which has been or may be concluded or granted in opposition to such prohibition is declared null and void."

I have set out the words of so much of the above Section as bear upon the point under consideration, as it is not printed in the ordinary collections of the Regulations.

The Section avoided all leases and pottahs for the cultivation of lands for a term exceeding ten years, whether they reserved a full rent or a nominal rent, or no rent at all. It did not require leases or grants for periods not exceeding ten years to reserve an adequate rent or a nominal rent, or any rent at all.

By Section 6, it was expressly enacted that "nothing in the Regulation should be construed to prohibit a zemindar, independent talookdar, or other actual proprietor of land, from selling, giving, or otherwise disposing of any part of his lands as a dependent talook."

This provision was, however, subject to Section 2, which declared that the grant should not be for a term exceeding ten years.

I have read the precise words of Section 6, inasmuch as the two Judges who formed the majority of the Court, and whose judgment prevailed in Rajah Modhnarains's case, to which I shall presently refer, declared that the power of creating dependent talooks, or granting leases at any rent, was fully accorded; and they referred to Section 6, Regulation XLIV of 1793, in support of that doctrine.

Regulation XLIV then proceeded to declare that all grants to dependent talookdars, and all leases and pottahs to ryots, with certain exceptions, should stand cancelled by a sale for arrears of revenue.

Section 8 provided that nothing in the Regulation contained should be deemed to prohibit actual proprietors of land from granting leases or pottahs of ground for any term of years, or in perpetuity, for the erection of dwelling-houses or buildings, for carrying on manufactures, or for gardens or for other purposes, or for offices for such houses or buildings.

Grants for the purposes mentioned in Section 8 were amongst those excepted from the provisions of Section 5, and consequently were binding upon a purchaser at a sale for arrears of revenue.

The only distinction made by Regulation XLIV between grants and leases, for the purposes mentioned in Section 8, and those for other purposes, was that the former might be granted for any term or in perpetuity, and were not invalidated by a sale for arrears of revenue, whilst the others could not be granted for a period exceeding ten years, and were, according to Section 5, to stand cancelled in the event of a sale for arrears of revenue.

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So careful was the Legislature to protect leases, whether for a term of years or in perpetuity, for the erection of dwelling-houses or buildings, for carrying on manufactures, or for gardens or other similar purposes, that such leases were expressly made binding upon a purchaser at a sale for arrears of revenue.

Is it probable then that the Legislature would have authorized the grantors themselves or their heirs to treat such leases as invalid if some rent, however nominal, should not be reserved?

It may be convenient it I allude in this place to an argument put forward with reference to the following words in Section 1, Regulation XLIV of 1793:—"Such engagements, (referring to engagements at under-rates or reduced rates) if held valid, would occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the amount of the public demand upon their estates."

It was contended that it was the intention of Government to compel the zemindars, after the permanent settlement, to continue to collect the Government's portion of the produce of each beegah of land, in order that they and their heirs might be in a condition to discharge the revenue, and that the aristocracy which the Government had created might be maintained; or, to use the words of Mr. Justice Trevor, "that prevention was considered better than cure;" that the Government might not wish to sell for arrears, or that the arrears might not be realized by the sale.

I find no such intention declared or even implied in the preamble of Regulation XLIV, or in any other part of the Code. It appears to me to rest merely in imagination. The security and resources of Government would doubtless have been diminished if grants for long terms or in perpetuity, made after a permanent settlement at nominal or inadequate rents, had been allowed to stand good as against a purchaser in the event of a sale for arrears of revenue.

The mischief contemplated, as regards the injury likely to be done to heirs by improvident grants made by their ancestors, was provided against by Section 2, which rendered void all grants of leases or pottahs for a term exceeding ten years. The mischief, as regarded the diminution of the security and the resources of Government, was provided against by Section 5, which rendered all grants, except those included in Sections 7 and 8, should stand cancelled in the event of a sale for arrears of revenue.

In considering the question whether the words "exempt from the payment of revenue" in Section 10, Regulation XIX of 1793, were intended to apply to leases or grants made by zemindars or other proprietors after a permanent settlement to hold free from the payment of rent to them or their heirs, it is important to remark that, by Section 14, Regulation XLI of 1793, it was enacted that, in framing the Regulations, the same description and terms were to be applied to the same descriptions of things, in order that rights, property, and all persons and things might be uniformly described throughout the whole of the Code; that in Regulation XIX of 1793 "revenue" and "rent" are used as designating two distinct things; and that in that Regulation the words "grants to hold land exempt from the payment of revenue" were substituted for the words "rent-free," which were used in the Regulation of the 1st December, 1790.

The following propositions are, I think, clear as regards permanently settled estates:—

First.—That the only revenue payable to Government for an estate is that which the zemindar has engaged to pay to Government.

Second.—That the zemindars are proprietors of the soil. (Regulation II of 1793, Section I.)

Third.—That, as such, they are entitled to the rents of the lands included in their estates, and to distrain for such rents. (Regulations XIX of 1793, and XVII of 1793, Sections 1 and 2.)

Fourth.—That such rents being the property of the zemindars, and not the property of Government, are not Government revenue, and cannot be alienated by Government, and that the zemindars are not bound to account for, or pay over to Government, any portion of their rents.

It seems to follow—

First.—That after a permanent settlement, a grant by a zemindar to hold lands "rent-free" is not a grant to hold free from the payment of revenue.

Second.—That such a grant is void as against a purchaser at a sale for arrears of revenue; but that as long as the revenue is paid, it cannot be treated by Government as a nullity, as affecting their interests injuriously.

Third.—That a rent-free grant cannot be treated as a nullity by the grantor or his heirs, or by any person claiming through him.

I will now proceed to consider the authorities bearing on the question before us.

It was said by Mr. Justice Campbell that "there are very few cases on the subject, because no one ever thought of any other construction than that Section 10 applies to rent-free grants made by a zemindar after a permanent settlement." I find no tradition to that effect in any reported case, or in any history of the permanent settlement. The assertion is not borne out by any treatise or by the declaration or arguments of any of the Judges or pleaders who were concerned in any of the cases in which the question arose.

The earliest case which I have been able to find upon the subject was directly opposed to that construction, and I see no reason to think that the Judges who decided it were wanting in experience The case to which I refer is that of Paramanick *vs.* Odeynaram Mundel, reported in 6 Sudder Dewanny Reports, Select Cases, p. 281.

That case, which was cited in argument before us, was decided in the year 1840, more than a quarter of a century nearer than the present time, to the date of the enactment, upon which we are now called upon to put a construction, and when the Judges must have had means, at least as good as we have at this day, of knowing what was the general opinion, if there was any upon the subject.

In that case, the plaintiff purchased the rights and interests of one Doorga Dass in a putnee talook, and sued to recover a tank within that talook. The land in which the tank was made was granted in 1217, B. S., before the putnee was created, to the defendant's father by the zemindar to be "held rent-free." The Judge gave a decree for the plaintiff upon the ground that no such grant made after the decennial settlement could stand, but upon appeal to the Sudder Court the decree was reversed.

Mr. Dick said—"The argument of the Judge as to rent-free grants after the decennial settlement does not apply. That will be applicable, should the rights of the zemindar be sold for arrears of revenue, but can never apply to the case of a purchaser of the mere rights and interests of the putneedar." The other Judge, Mr. Tucker, said:—"The tank has been improperly called lakheraj. It is not lakheraj, for it has been exempted as such from the general estate for which the zemindar pays revenue to Government." The zemindar himself gave a rent-free grant of it to the appellant, defendant's father, and subsequently sold the talook in which it is situated in putnee. The respondent has succeeded to the rights of the putnee, but cannot touch the previous grant to the appellant's father."

Here then was an express decision, not based upon the ground that the land granted was for a tank, nor upon the ground that the water of the tank was rent or revenue. It was decided upon general principles applicable to all rent-free grants made after 1st December, 1790, and after a permanent settlement.

The rule laid down in that case was followed by that of Hurree Mohun Doss *vs.* Pran Kissen Rae, decided in 1847, and reported in the Sudder Decisions for that year, p. 447. In that case it was held that a grant rent-free of land upon which a tank had been dug was good, even as against a purchaser for

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arrears of revenue. If Section 8, Regulation XLIV of 1793, had required the reservation of a rent, the grant would have been invalid. The decision is an authority that a reservation of rent was not necessary.

The case was decided upon general principles, and, no doubt, was correctly decided. Section 8, Regulation XLIV of 1793, allows grants to be made for long terms or in perpetuity for "other purposes" of a nature similar to those particularly described therein; and a grant for the digging of a tank was, no doubt, a grant for the purpose within the meaning of Section 8. There was clearly nothing in that Section which rendered a reservation of rent necessary. The only question was whether Section 10, Regulation XIX of 1793, had the effect of requiring some rent. Leases under Section 8 of Regulation XLIV of 1793 were expressly exempted from Section 5, and were therefore good as against a purchaser for arrears of revenue, unless they were rendered void by Section 10. The Court held that it was not lakheraj under that Section.

In the case of Baboo Modhnarain Singh *vs.* Ameeroonnissa Begum, Sudder Decisions for 1852, page 967, the plaintiff claimed to recover certain land which had been granted rent-free by his ancestor. It was contended that the grant was void under Section 10, Regulation XIX of 1793. But the Court held that the plaintiff could not repudiate his own act and that of his ancestors. That was decided upon a well-known general principle that an heir claiming through his ancestors cannot invalidate the grant of his ancestors of property which he claims by descent from them.

In the case No. 1157 of 1854, the plaintiff sued for the resumption and assessment of certain lands granted rent-free for the purpose of digging tanks. The Principal Sudder Ameen dismissed the suit, upon the ground that the grants were good under Section 8, Regulation XLIV of 1793. The Judge reversed the decision, on the ground that the sunnud on which the lakheraj depended was invalid. He held that the grant was void under Section 10, Regulation XIX of 1793. The Sudder Court held that the decision of the Judge was incorrect; that the case was one between landlord and tenant under Section 8, Regulation XLIV of 1793, and not under the Resumption Laws, and they remanded the case.

That case was followed by the case No. 336 of 1857, Sudder Decisions, 1858, page 968.

In the face of all these cases, I know not how it can be asserted that no one ever thought of any other construction than that which is contended for. The only case in which I find that such a construction was ever put upon the Section is that of Rajah Modenarain Singh *vs.* Ahmed Ali Khan.

Sudder Decisions, 1855, page 395.

In that case Ahmed Ali Khan was plaintiff. He sued to recover possession of certain lands given to him by Rajah Mitterjeet Singh, the defendant's ancestor, in 1211 Hijree, in exchange for a copy of the Koran, and from which the defendant Rajah Modenarain Singh, the heir of Rajah Mitterjeet Singh, had ousted him, claiming a right to do so under the provisions of Section 10. The Principal Sudder Ameen held that the grant of the defendant's ancestor was valid, and that it could not be ignored under Section 10, Regulation XIX of 1793, and he gave the plaintiff a decree for possession of the land to be held rent-free.

The Additional Judge, on appeal, held that the plaintiff was entitled to possession upon condition of his paying rent for the land, upon the ground that Section 10, Regulation XIX of 1793, did not sanction the grant of any land made after 1st December, 1790, exempt from the payment of revenue.

On appeal, two of the Judges of the Sudder Court, Sir Robert Barlow and Mr. Binny Colvin, held that the grant was void under Section 10, Regulation XIX of 1793; that the decisions of both the Lower Courts were wrong; and that defendant was entitled to take possession of the estate, notwithstanding the plaintiff had been in undisturbed possession under the grant for upwards of fifty years; and they held that the plaintiff was not entitled to either a proprietary right in the land, or to a right to possession upon paying rent for it.

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Mr. Dick, however, with his usual good, strong common sense and earnest desire to do justice, said:—"I concur with the Principal Sudder Ameen that the grant is not resumable by the heirs of the grantor, and that Section 10, Regulation XIX of 1793, does not apply to the case. The law could not intend to declare that the party who had made the grant could at pleasure resume it, whether given for a valuable consideration or not, or intend to entitle the heirs of such grantor to resume. This would be authorizing such persons to repudiate their own acts and the acts of their ancestors. Grants of the nature in question, *quoad* the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue; and if he do not, the estate is sold, and then the grant becomes null and void. The law, Section 10, Regulation XIX of 1793, was enacted to prevent alienations prejudicial to the security of the public revenue, not to enable the heirs of proprietors (whose ancestors' acts are theirs) to profit by their own wrong. The proprietors and their successors, who were authorized to resume at pleasure, are not those who made the grants or their hereditary successors. An auction-purchaser can annul all grants and alienations. This the law declares. All *bonâ fide* alienations are binding on those who made them and their heirs. This justice requires, and our precedents have decided."

By that decision the plaintiff was deprived of lands which he had obtained for a valuable consideration from the defendant's father, and of which he had held possession for thirty-four years in the lifetime of the father, and seventeen in the time of the defendant himself after his father's death.

The plaintiff's pleader, Moonshee Ameer Ali, cited on behalf of his client the case of Paramanick *vs.* Odeynarain Mundel, to which I have referred; yet the Judges did not, in their judgment, refer to that case, or give a single reason for holding that Section 10, Regulation XIX of 1793, was opposed to such alienations, notwithstanding it had been expressly decided fifteen years previously in the case to which I have just referred, and which was brought to their notice, that Section 10 did not apply to rent-free grants made by a zemindar after a decennial or permanent settlement.

They added:—"But the power of creating dependent talooks, or granting leases at any rent, is fully accorded;" and they referred, in support of that proposition, to Section 6, Regulation XLIV of 1793, and to Regulations V and XVIII of 1812, which do not even use the word "rent."

This case seems to have been the origin of the impression that grants not reserving any rent are void, but that grants which reserve a mere nominal rent are valid and binding. I cannot hold myself bound by such a decision.

The two Judges, in their judgment, referred, in support of their construction of Section 10, to the language of the Sudder Court in the case of Sheikh Shufaetoollah *vs.* Joy Kissen Mookerjee, Sudder Decisions for 1848, page 462; but they appear to have entirely misunderstood the passage.

It is as follows:—

"In the absence, however, of any such provisions as that of Section 10, Regulation XIX of 1793, it appears to us that the Courts of Justice must have held that grants (that is, grants to hold exempt from the payment of revenue) made at a period subsequent to the date of the permanent settlement are null and void. It is a narrow and contracted view to suppose that the permanent settlement consists of nothing more than the obligation on the part of the zemindar to pay a certain amount of revenue to the Government. The permanent settlement is a compact by which the zemindar engages on his part to pay a fixed amount of revenue to the State, and the State, on its parts, guarantees to the zemindar, by means of its judicial and fiscal administration, the integrity of the assets from which that revenue is derived, and which, in fact, constitutes the Government's own security for the realization of its revenue. The declaration to the zemindars and other proprietors of land that the jumma assessed upon their lands is fixed for ever, (Section 3, Regulation I, 1793,) carries with it, by necessary implication, a rule of the nature laid down in Section 10, Regulation XIX, 1793."

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It is clear that the fixing of the revenue for ever could not have been held to have carried with it, by implication, a rule that all grants by a zemindar, not reserving rent to himself, should be void as against the grantor himself and his heirs; and that he might consequently sell, and then take away from the purchaser that which he had sold.

The suit in that case was to resume and assess invalid lakheraj lands, not to recover lands which the zemindar or his ancestor had sold. The Court entered fully into the whole case, pointed out the distinction between grants prior and those subsequent to 1st December, 1790; and they held that the *nullum tempus* Clause in Section 10 applied to such grants, and that the general provision as to twelve years in Section 14 of the Regulation for the limitation of suits (III of 1793) did not apply to a suit for resumption of lands held under invalid lakheraj grants.

The meaning of the passage referred to is very clear. It entirely corroborates my view of the case. It is this: that even without any express declaration, such as that contained in Section 10, grants by unauthorized persons alienating the revenue of an estate would have been void as against Government, and all persons who derived title through Government, and that Government guaranteed to the zemindar the integrity of the assets, upon the basis of which the permanent settlement of their estates was made, and that the zemindars should be entitled to the rents of all lands in respect of which they engaged to pay revenue. It did not mean that the Government guaranteed to the zemindars that they might repudiate their own grants or those of their ancestors.

The *dictum* in the 2nd Full Bench case upheld the ruling in Rajah Modenarain's case Mr. Justice Norman, then Officiating Chief Justice, after referring to the preambles of Regulations XIX of 1793, and XLIV of 1793, says:—"Reading those Regulations together, it seems to have been the intention of the Legislature to treat the zemindars as agents or trustees for the Government, and, as such, bound to collect the Government share of the produce from each and every beegah of land within their zemindary."

See 2 Weekly Reporter, p. 16.

With all deference, this appears to me to be in direct opposition to one of the fundamental principles of the permanent settlement, by which the zemindars were for the first time declared to be the proprietors of the lands. If the zemindars were agents or trustees for the Government for collecting its share of the produce, they would have been bound to pay over to Government the collections when made, and they would not have fulfilled their agency or trust by collecting a mere nominal rent for lands of large value.

If they were trustees or agents for Government, and not bound to account for, or pay over the collections when made, we have the anomaly of an agent or trustee bound to collect that which he is not liable to pay over, and for which he is not bound to account.

The fact is, as soon as an estate was permanently settled, the Government became entitled to receive the amount which the zemindar agreed to pay as revenue for the estate, and so long as that amount was duly paid, the Government had no further interest in the lands or the rents of them. If the revenue fell into arrear, the Government had power to sell the estate free from all leases or incumbrances created by the zemindar.

Mr. Justice Norman proceeds:—"They (that is, the zemindars) are incapacitated from depriving themselves of the right and obligation of collecting revenue which, by Regulation XLIV, is declared inalienable, *i. e.*, by the zemindar, without the express sanction of Government; and it is in accordance with that principle that all grants by zemindars, which exempt the grantees from liability to pay revenue to the zemindar, are declared null and void by Section 10, Regulation XIX of 1793. If, therefore, the grant now before the Court is considered simply as a rent-free grant created by a zemindar since 1790, I should feel bound to agree with the Court below, and say that it is null and void."

Here, again, there appears to be a mistake. Regulation XLIV of 1793 did not declare that the Government revenue was inalienable by the zemindars with

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out the express sanction of Government. It merely declared that, according to the ancient and established usages of the country, the dues of Government from the lands were inalienable without the express sanction of Government, unless Government has transferred its rights thereto to an individual for a term or in perpetuity, or fixed the public demand upon the whole estate, &c. The ancient law, as I shall presently show, was subject to the exception expressed by the words "unless," &c., above referred to.

The rule laid down in the 2nd Full Bench case is not even confined to leases and grants of dependent talooks; it extends to grants in fee-simple, or to what may more properly be called grants of the whole proprietary right in any part of an estate.

Mr. Justice Trevor says:—

"This instrument is a grant in fee-simple of 22 beegahs of the grantor's revenue-paying estate to the grantee to be held by him free of revenue for ever, and the case can in no way be construed as a lease, for there is no annual return or rent made by the grantee as tenant, either in money, labor, or kind. The condition in the grant, if condition it can be called, is only a condition subsequent, and there is no contention on the part of the grantor that the grant is liable to be defeated in consequence of a breach of this condition. It is simply contended that the grant is of a nature contrary to the public policy, and one that, by Statute, has been declared null and void. Had it been a lease, however small the rent reserved, it would have been legal under the terms of Section 8, Regulation XLIV of 1793; but as it is a grant involving that which the zemindar had no power to grant, *viz.*, the Government portion of the produce of the land, granted in perpetuity, it is altogether, it seems to me, illegal, and contrary to the policy of the law as laid down in the Regulations."

He then refers to the recital in Regulation XIX of 1793 as declaratory of what the common law of the country was, and says—"Section 10 of that Regulation, in furtherance of this view of the common law of the country, declares that all grants for holding lands exempt from the payment of revenue made by a zemindar since the 1st December, 1790, are null and void, and that no length of possession shall be considered to give validity to any such grant, either with regard to the property in the soil, or the rents of it."

Although Mr. Justice Trevor speaks of the grant as a grant to hold revenue-free, it was in its terms, and, as I consider, in substance and reality, merely a grant to hold free from the payment of rent to the zemindar or his heirs.

There is a slight difference in the terms of the grant as stated by the Officiating Chief Justice, and as stated by Mr. Justice Trevor. That possibly arose from the translation.

It was, in substance, a grant of land to the grantee and his heirs for ever for digging a tank for the benefit of the villagers. The concluding words of the grant, as stated by the Officiating Chief Justice, are—"You will dig a tank in this land, and make a reservoir of water. We shall have no right in the land. Being vested with the right therein, and bringing it under your possession and seisin, you will continue to distribute water. You will stock the tank with fish, plant on the raised and low banks thereof mangoe trees, &c., and enjoy the same down to your son's son, and so on in succession. No rent shall have to be paid for the land. Should we or any of our heirs ever prefer any claim to this, the claim will be void."

In Mr. Justice Trevor's statement of the sunnud, it appears that the land granted was a piece of marshy ground, for which no rent was paid at the time of the grant. The grantor declared that, after the grant, "he would have no right to the land, and that the grantee and his heirs should hold possession in his own right from generation to generation, and then it is said no rent for the land will be charged," &c.

The grant therefore appears to have been a grant, as Mr. Justice Trevor calls it, in fee-simple, or, more properly, to use the words of the Regulations

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when speaking of lands in the Mofussil, to which the English law does not apply, a grant of the whole of the zemindar's proprietary rights in that part of his estate without reserving any reversion or any rent or condition. In short, the grantor parted absolutely with all his interest in the land which was the subject of the grant.

I should have thought it clear that Section 10 had nothing to do with such a grant; that the grant was not within the spirit of the law; and most certainly that it was not within the letter of it.

Mr. Justice Trevor, however, treats the grant as within the letter as well as the spirit. He says:—" It may be said that the grant in this case, though against the letter, is not against the spirit of Section 10, which prohibits only improvident grants," &c. It was certainly, to my mind, not within either the letter or spirit of the law.

He then quotes the words of Mr. Dick in Rajah Modenarain's case:—" Grants of the nature in question, *quoad* the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue; and if he do not, the estate is sold, and then the grant becomes null and void;" and he proceeds thus:—" This is, no doubt, in the main, true; and at the decennial settlement the Legislature might, had it chosen, have relied on the sale law to remedy any improvident act done by the zemindars, and restore estates to their original state. But it considered prevention better than cure; and with the former object, keeping in view the common law of the country and the probable improvidence and weakness of the zemindars it had then created, it enacted Regulation XIX of 1793, and thereby declared that all grants of the nature of that before us are null and void, and that no lapse of time shall cure them. It follows that as they are null and void in their inception, they can be resumed even by the grantor or his heirs at pleasure"

If this view of the law were correct, there would have been no necessity to pass Regulation XLIV of 1793. But Regulation XIX of 1793 had nothing to do with the improvidence of the zemindars.

It was passed, as shown by its title and preamble, with reference to alienations of the revenue payable to Government. On the other hand, Regulation XLIV of 1793 had nothing to do with alienations of the public revenue, but had reference only to grants of leases or dependent talooks by the zemindars.

It is beyond doubt that Regulation XLIV of 1793 had no reference to grants in fee-simple, as they are called by Mr. Justice Trevor, or grants which passed the whole proprietary rights of a zemindar in the whole or in any particular portion of his estate. Such grants were expressly provided for by Regulation I of 1793, Sections 9 and 10.

The whole Code of 1793 was passed on the same day, the 1st May, 1793. All the Regulations must be studied together, and read as a whole. It is not safe or proper to take one enactment here and another enactment there, and to interpret them without reference to the whole Code. But it is not because the Code must be taken and studied as one entire system, that the preamble of one Regulation of the Code is to be read as explanatory of the meaning and intention of a Section in another Regulation. This is what was done in substance by one or more of the Judges in the 2nd Full Bench decision. They construed Section 10 of Regulation XIX of 1793 with reference to the preamble of Regulation XLIV of 1793, and not with reference to its own preamble. Such a mode of construing Regulation XIX is not only at variance with every sound principle of construction, but is in direct opposition to the rule laid down in Regulation XLI of 1793, which enacted, amongst other things, that every Regulation should have a title expressing the subject of it, and also a preamble stating the reasons for enacting it, in order that individuals might be able to make themselves acquainted with the laws, and that Courts of Justice might be able to apply the Regulations according to their true intent and import. (See the preamble and Sections 4 and 5, Regulation XLI of 1793)

Regulation XIX of 1793, and Regulation XLIV of 1793, and every one of the 48 Regulations which were passed on the same day, had its own separate title and preamble.

When Regulation XIX of 1793, and Regulation XLIV of 1793, each had its own title expressing the subject of it, and a preamble stating the reasons for enacting it, as required by Regulation XLI of 1793, Sections 4 and 5, it is only reasonable to suppose that those Regulations respectively contained all the provisions which the Legislature deemed necessary with reference to the particular subjects treated of in their respective titles and preambles. Yet the preamble of Regulation XLIV, which alone speaks of the contemplated improvidence of the zemindars, and of the necessity of protecting their heirs against it, is taken to explain the meaning of Section 10, Regulation XIX, which was passed to facilitate the recovery of the public dues from lands held exempted from the payment of revenue to Government under invalid grants, as well as to prevent similar alienations from being thereafter made to the prejudice of the security of the public revenue.

If the Legislature intended to prevent zemindars from granting dependent talooks or leases at inadequate rents, and to allow them to treat their own grants as nullities if they did not reserve at least a nominal rent, I should have imagined that, independently of the rules laid down in Regulation XLI of 1793, common fairness with regard to those who were to be bound by the law, and who had to regulate their dealings according to its provisions, would have induced the Legislature to express that intention in clear and unambiguous language, especially when any violation of the law was to be attended with such serious consequences to unsuspecting purchasers; and I should have expected to find that language in Regulation XLIV, and not in Regulation XIX of 1793, which related to an entirely different subject.

The zemindars, and those who purchased them, had clear and express notice by Regulation XLIV that, with certain exceptions, no grants by zemindars of dependent talooks or leases for periods exceeding ten years would be valid; and no grant by a zemindar of any part of his estate, whether on a term exceeding ten years or not, would be binding on a purchaser at a sale for arrears of revenue. Having that notice, it was for them to regulate their dealings accordingly.

But who, without the light of modern construction, could, on reading Regulation XLIV of 1793, have imagined that there was a Section in another Regulation, XIX of 1793, passed with an entirely different object, which rendered a purchaser of a rent-free lease or dependent talook, or even of an estate in fee-simple, liable to be treated as a trespasser by the vendor or his heirs, and turned out of possession after any length of possession under his purchase?

Mr. Justice Trevor, in the 2nd Full Bench, after showing that the grant was an alienation of part of a revenue-paying estate, goes on to say:—"Alienations after the 1st December were, *ipso facto*, null and void; they were unauthorized alienations by the zemindar of the Government portion of the produce, as well as alienations of his own share, and were opposed to the common law of the country, by which a portion of the produce of every beegah of land belonged to Government. As, moreover, the Government demand on estates had become fixed in perpetuity, it became of the greatest moment to prevent, as far as possible, the decrease of the security of the revenue, and hence the power which was given to the zemindars, enabling them at once, without recourse to the Courts, to dispossess the grantee and assess the rents after any lapse of time. The grantee, in short, was considered as a trespasser, who had, and could have, no rights in the eye of the law. It follows that Regulation XIX of 1793 placed the possessors of grants subsequently to December, 1790, in a very different position from that which they held before the passing of that Act."

In the same case, Mr. Justice Loch also seems to have considered that upon the permanent settlement the zemindars continued to collect as revenue the Government's share of the produce, and he also relied upon the ancient common law of the country. He says:—"It has been asked why, if a zemindar

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is able, as unquestionably he is by law, to alienate any part of his estate by sale or gift, he should be unable to create a rent-free tenure. That, as he can give perpetual lease at a quit-rent, there can be no good reason why he should not be able to forego his rent altogether, for if a rent-free grant be said to be injurious to the estate, a perpetual lease on a quit-rent, which the law allows him to make, might be equally injurious.

"The reason why such rent-free grants cannot be made, is that they are entirely opposed to the theory of the permanent settlement; and it is very remarkable how guarded the law has been on the subject; for, while it allows the zemindar to give a lease in perpetuity, it never sanctions such an alienation as a lakheraj or rent-free grant; and the reason is obvious when the principle of the permanent settlement is considered, which is clearly laid down in the preamble of Regulation XIX of 1793." After reading that preamble, he says:—"It is obvious that if a zemindar grants lands to any one free of rent, he not only alienates that portion of the assessment on each beegah of the land which the law permits him to appropriate, but he also gives up that portion which is the Government revenue, and thereby does a serious injury to the assets of the estate. He relinquishes the quota of the revenue with which each beegah of a permanently settled estate was charged at the time of the settlement; and it is no answer to say that the whole estate is liable for the revenue, for it is not only that the integral estate is liable for the whole revenue assessed upon it, but each beegah of land is responsible for its own quota of that revenue." In another part of his judgment he says:—"The reason why such rent-free grants cannot be made is that they are entirely opposed to the theory of the permanent settlement."

The argument that after a permanent settlement the zemindars, when they collected the rents of their estate, were collecting the Government's share of the produce of each beegah, as well as their own, appears to me to be founded upon a fiction and based upon an erroneous view of the object and intent of the permanent settlement. In my opinion, it is a mistake to suppose that after a permanent settlement the Government continued to be entitled to a share of the produce of every beegah of land in the settled estate, in addition to the amount which the zemindar engaged to pay as revenue. It is an error to suppose that the Government was, according to the ancient law, entitled, under all circumstances, and without any exception, to a certain proportion of the produce of every beegah of land in cultivation.

In stating what the ancient law was, the Legislature very clearly pointed out that it was subject to an exception.

The law is defined as follows:—"By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every beegah of land demandable in money or kind according to local custom."

The exception is pointed out in the following words:—"Unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, so long as he continues to discharge the latter."

In construing the Regulations, we must take the law as it was defined by the Legislature with reference to the enactments which they founded upon it; and when they introduced into that definition an exception in the case of a transfer in perpetuity, or of the limitation of the public demand upon the whole of the lands of an individual, we must understand them to mean that, as soon as such a transfer should be made, or the public demand upon an individual should be limited in perpetuity under the operation of the laws which they were then enacting, the Government would cease to be entitled to the proportion of the produce of every beegah to which they would have had a right under the ancient law of the country.

When a zemindar entered into a temporary engagement to pay a certain sum as revenue for the whole of an estate which belonged to him, and the

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Government limited the public demand upon the whole of the lands in that estate to the sum which the zemindar agreed to pay as revenue, the Government, according to the law as defined in the Regulation, ceased, during the term of the settlement, to be entitled to a proportion of the produce of every beegah of land in the estate. The public demand upon the whole of the lands in the settled estate was limited to the sum which the zemindar engaged to pay as revenue, and he was left to appropriate to his own use the difference between the value of that proportion of the produce to which the Government would have been entitled if the settlement had not been made, and the sum payable by the zemindar as revenue under his engagement. In short, so long as he continued to pay the sum which he engaged to pay as revenue, he was to be at liberty, during the period for which the settlement was made, to appropriate to his own use the whole of the assets or rents of the estate, and in so doing, to appropriate to his own use the difference between the value of the Government's proportion of the produce, that is, the rents payable to the occupiers, and the amount which at the time of the settlement he engaged to pay as revenue. It seems to be a forced construction to hold that the Government continued entitled to its own proportion of the produce, or any part of it, when the zemindars were expressly authorized to appropriate to their own use the whole difference between the value of such proportion and the revenue which they agreed to pay permanently in lieu of it.

The revenue settlement seems to have been treated, so long as it continued, as a composition entered into by the zemindars for the revenue of the estate, and when the term for which the settlement, if temporary, was made, expired, the Government again became entitled to its proportion of the produce of each beegah of land in cultivation, of which an estimate was made before a fresh settlement was entered into.

That was the case under the old law, and then the zemindars were not entitled to enter into any engagements with their dependent talookdars, under-farmers, or ryots for any period beyond the term of their own engagement with the Government. (Regulation XLIV of 1793, Section 1.)

When, however, a permanent settlement was entered into, the Government ceased to be entitled to anything beyond the amount which the zemindars contracted to pay as revenue, and the zemindars, according to a solemn declaration, became the proprietors of the lands. The property in the soil was vested in them, and they were at liberty "to transfer by sale, gift, or otherwise their proprietary rights in the whole or any portion of their respective estates" (Regulation I of 1793, Section 9), and to let their lands in whatever manner they might think proper, subject to the restrictions in Regulation VIII of 1793. (See Section 52 of that Regulation.) They were also authorized to grant dependent talooks (Section 6 of Regulation XLIV of 1793), and to distrain for the rents due from their tenants. (Regulation XVII of 1793, Section 2.) They were, however, expressly restrained at the time from granting leases or talooks for any period exceeding ten years, except for the purposes mentioned in Section 8, Regulation XLIV of 1793, for which they were allowed to make grants in perpetuity; and all leases and grants, with a few exceptions, such as those made for the purposes mentioned in Section 8, Regulation XLIV of 1793, were, in the event of a sale for arrears of revenue, to stand cancelled from the day of sale.

Section 6 of Regulation VIII of 1793, and Section 2 of Regulation XVII of 1793, show very clearly that the Legislature did not consider that the zemindars, after a permanent settlement, when collecting the rents of their estates, would be collecting public revenue from their dependent talookdars, farmers, and ryots, or that such talookdars, farmers, and ryots, would be paying to Government through the zemindars the share of the produce to which, under the ancient law, the Government would have been entitled if a settlement had not been made; for what was the use of declaring that the talookdars specified in Section 6, Regulation VIII of 1793, *viz.*, those who, by virtue of an express stipulation in their sunnuds or title-deeds, then paid their revenue through the

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zemindar, should continue to pay their revenue through him, if it was contemplated or intended at that time that every dependent talookdar or ryot, or occupier of land who should pay rent to the zemindar should be deemed to be paying to Government, through the zemindar, the Government's share of the produce of the land.

Moreover, the kists or instalments of revenue payable by the zemindar to Government were not necessarily due at the same time as the instalments of rent payable to them. By Section 64, Regulation VIII of 1793, which was passed for the benefit of the under-farmers and ryots, the zemindars were required to adjust the instalments of the rents receivable by them from their under-renters and ryots according to the time of their reaping and selling the produce.

In the present case, the grantor, in some of the grants, was not a zemindar, but a mokurrureedar; and the question is whether his heir can resume lands granted by him rent-free, though he pays rent to the zemindar, and the zemindar pays revenue to Government.

It follows from what I have already stated that, in my opinion, the heir cannot resume the lands.

If a grant rent-free by a zemindar who pays revenue to Government is not a grant to hold exempt from the payment of revenue, it follows that a grant made by a tenant of the zemindar to an under-tenant rent-free would not be a grant to hold exempt from the payment of revenue. But some of my late honorable colleagues have expressed an opinion that rent-free grants by mokurrureedars, as well as rent-free grants by zemindars, are grants to hold exempt from the payment of revenue.

Upon this subject Mr. Justice Trevor says:—"The plaintiff in this case is a mourosee ijaradar, or a person who holds the estate in farm of the proprietor. He is therefore, under Section 10 of Regulation XIX of 1793, authorized and required to collect the rent for the lands at the rate of the Pergunnah, and to dispossess the grantee (that is, the grantee who purchased from his ancestor) of the proprietary right in the land," &c.

Mr. Justice Campbell also says:—"The word 'revenue' being, in my view, used in the sense of the khiraj payable by the ryot or cultivator, it seems to me to be quite immaterial whether the plaintiff is the zemindar or the assignee of the zemindar of the 1st, 2nd, 3rd, or 10th degree of sub-infeudation. The suit may, I consider, be maintained by any person entitled to receive the khiraj."

But if there are sub-infeudations, as they are called, or rather ten dependent talooks or leases intervening between the zemindar and the cultivator, each of the talookdars collects rent from the holder of the tenure next below him, and it is only the last who receives rent or a share of the produce of the soil from the actual cultivator.

The mere argument that the rents payable by each of the various under-tenants to the landholders under whom they respectively hold is revenue, seems to me to be a strong argument against the correctness of the doctrine that, after a permanent settlement, all rent is revenue within the meaning of Section 10, Regulation XIX of 1793.

In Rajah Modhnarain's case it was held that the grantor could treat the grantee as a trespasser and turn him out of possession, and the Sudder Court went to the extent of reversing the decision of the Zillah Judge, because he held that the grantee to whom the rent-free grant was made was entitled to retain possession of the lands upon condition of his paying rent for them at the pergunnah rate.

In the Full Bench case of Sonatun Ghose *vs.* Abdool Furrar, 2 Weekly Reporter, Civil Rulings, 92, Mr. Justice Trevor says:—"The grantee, in short, was considered a trespasser who could have no rights in the eye of the law."

Mr. Justice Norman, then officiating as Chief Justice, says:—"Section 10 of Regulation XIX of 1793 authorized the zemindars to resume, or, in other words, to retake possession without a suit."

Mr. Justice Sumbhoonath Pundit says:—"The law could not provide rules

for anything less than the power it had given, *viz.*, that of ousting the lakheraj-dar, and so no provision was made for any other limited mode of exercising that power which the landlord may find it expedient to adopt."

It was, however, held by the Judicial Committee that a purchaser at a sale for arrears of revenue could not, under Section 5, Regulation XLIV of 1793, treat a talookdar as a trespasser, and turn him out of possession, but that he could only recover the same rents from him as the former proprietor could have done if the grant had not been made.

If the decision of the Sudder Court in Rajah Modhnarain's case, and the principles laid down in the 2nd Full Bench case and in the case of Sonatun Ghose and others *vs.* Abdool Furrar, are correct, that the grantor of a rent-free tenure and his heirs can, under Section 10 of Regulation XIX of 1793, treat the grantor as a trespasser, and turn him out of possession, the grantor and his heirs will have a greater power as against a purchaser of lands for which no rent is reserved, than a purchaser for arrears of revenue would have under Section 5, Regulation XLIV of 1793.

It appears to me to be a great anomaly that a grantor should have a greater power against the grantee to whom he has sold lands rent-free than a purchaser at a sale for arrears of revenue who claims through the Government adversely to the grantor.

It is a general principle of law that a man shall not avoid his own grant, and another that an heir is bound by the acts of his ancestor in respect of lands which he inherits from him.

Those principles are founded upon justice and common sense, for law is intended to suppress fraud, not to encourage it.

In the case to which I have just referred, Ranee Shurnomoyo *vs.* Rajah Suttis Chunder, in the Privy Council, reported in 10 Moore's Indian Appeals, 123, and also in 2 Weekly Reporter, Privy Council cases, 13, the rule by which a Bishop was not allowed to invalidate his own grant under the disabling Statute, 1 Eliza. Cap. 19, was referred to for the purpose of illustrating a general principle of construction. The rule did not directly govern the case before the Privy Council, for the question there, was whether a purchaser for arrears of revenue having a right to treat a zemindar's engagement with a dependent talookdar as cancelled under the provisions of Section 5, Regulation VIII of 1793, could treat the talookdar as a trespasser and turn him out of possession, or merely enhance his rent to a fair rate. There was no doubt as to whether the auction-purchaser could treat the engagement under which the talookdar held as cancelled.

But the principle referred to in the case in the Privy Council is peculiarly applicable to the present case, in which the question is, whether a zemindar can treat his own grant as void, or whether an heir can avoid a grant made by his ancestor.

The following remarks of Lord Justice Turner, in delivering the opinion of the Judicial Committee, are so pertinent to the present case, that I need not offer any apology for quoting them :—"English lawyers are familiar with the principle of construction, applied as early as the time of Lord Coke (*see* 1st Inst. 45) to the disabling Statute of 1st Eliza. Cap 19, Section 5, and in several modern reported cases between landlord and tenant on clauses of forfeiture in leases. Words which make a Bishop's grant utterly void and of no effect to all intents, construction, and purposes, have been held not to prevent the grant from being good and binding on the grantor, and in some cases conformable by the successor; and so a proviso in a lease that it should be void altogether in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which, for its justice, reasonableness, and convenience, must be considered of universal application. In the present case, the object of the Government was, that the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants

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of the zemindars who had made default, but cases of default might often arise where no improvident grant had been made, where the talookdars and the ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other causes. In such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests"

It is to be observed that the principles laid down in the 2nd Full Bench case apply not only to rent-free grants of dependent talooks and leases, but also to grants by a zemindar of his whole proprietary rights in a portion of an estate. This, if possible, carries the doctrine to a more dangerous extent than if it were confined to leases and independent talooks.

Mr. Justice Trevor says:—"This instrument is a grant in fee simple of 22 beegahs of the grantor's revenue-paying estate to the grantee to be held by him free of revenue for ever; and it can in no way be construed as a lease, for there is no annual return of rent made by the grantee as tenant, either in labor, money, or kind," &c. "Had it been a lease, however small the rent reserved, it would have been legal under the terms of Section 8 of Regulation XLIV of 1793; but as it is a grant involving that which the zemindar had not the power to grant, *viz.*, the Government portion of the produce of the land granted in perpetuity, it is altogether, as it seems to me, illegal, and contrary to the policy of the law as laid down in Regulation XIX of 1793."

The grant no doubt conveyed all the grantor's interest in the estate to the grantee and his heirs for ever, and is, what we should call in English law, a grant in fee simple, and what I should call, in the words of Section 9 of Regulation I of 1793, a grant of the zemindar's proprietary rights in a portion of his estate. It matters not whether the grant was for a large or a small portion of the estate, for half the zemindary, or for the whole or part of a village or mehal. The zemindar retained no right or interest, reversionary or otherwise, in the land granted, and he reserved no rent for it. Mr. Justice Trevor treats it as a grant in fee simple without any reservation of rent. Such a grant conveys all the proprietor's rights in the land.

If the grant of the 22 beegahs of land for a tank rent-free was a grant of the Government's portion of the produce of the land granted, and therefore void, and the grantee was a trespasser, because the grant "did not reserve a rent, a similar grant by a zemindar of the greater part of his zemindary or of a whole village or mehal to a man and his heirs for ever, without reserving a rent, would be void, and the grantee might be treated as a trespasser and turned out of possession, even though he might have paid large sums as purchase-money for the grant.

A grant in fee simple or a grant of a zemindar's proprietary rights in a particular part of his zemindary or in a particular village or mehal to a purchaser and his heirs for ever, does not usually reserve a rent or condition.

A mortgage by a zemindar of his whole proprietary rights in a portion of his estate by conditional sale would not reserve a rent. When foreclosed, the conditional sale becomes absolute; but still it has only the effect of an absolute grant or transfer by the zemindar of his proprietary rights in a portion of his estate without any reservation of rent.

Sections 9 and 10, Regulation I of 1793 provide that the grantee in such a case is entitled to have the revenue apportioned, and to hold the lands included in his grant as a separate estate, subject to only that portion of the revenue which may be assessed upon it under the provisions of Section 10. But if the grant is void under Section 10, Regulation XIX of 1793, because no rent is reversed, the zemindar or his heirs may intercept the grantee, and before he can obtain a butwarra, or get the portion of the estate which has been conveyed to him, converted into a separate estate, may treat him as a trespasser, and turn him out of possession, and resume the lands which he or his ancestor had sold.

Besides, if the grant, as held by Mr. Justice Trevor, is null and void under Section 10, Regulation XIX of 1793, the Government officers could not

legally give effect to it by carrying out the provisions of Section 10, Regulation I of 1793 in respect of the lands included in it. It is clear that the Legislature never contemplated that such grants would be void if made rent-free. There could be no reason why a man who purchases the whole interest or proprietary right in a particular mehal or other portion of an estate, or obtains a grant, as Mr. Justice Trevor calls it, in fee-simple, should pay rent to the zemindar, as well as his portion of the Government revenue to be assessed upon the lands conveyed to him.

If that part of the zemindary which is sold to him is liable to have its own portion of the revenue assessed, what necessity can there be for any reservation of rent to the zemindar, who parts with all his interest in it? There cannot be any greater necessity for the reservation of rent to a zemindar who sells all his proprietary rights in one-half of his zemindary, than there is for a reservation of rent by a zemindar who sells his whole interest.

Regulation XLIV of 1793 does not apply to grants of proprietary rights, but only to dependent talooks and leases. It has no reference to grants in "fee-simple," or, as they may be more properly designated in the Mofussil, grants of the whole of a zemindar's rights and interests in a part of his estate.

No one will, I think, after reflection and a careful consideration of Regulation I of 1793, Sections 9 and 10, hold that such grants are void under Section 10, Regulation XIX of 1793, if no rent is reserved to the grantor.

It is clear that Clause 3, Section 10, Regulation I of 1793, which has been referred to by Mr. Justice Norman, does not require a rent to be reserved to the zemindar upon the grant of his proprietary rights in the whole or in a portion of his estate. It merely contains directions as to the apportionment of the Government revenue when an estate is divided into two or more distinct portions. The Section has nothing to do with the reservation of rent upon the grant of a dependent talook or lease, which, by the express terms of Clause 10, Regulation I of 1793, Art. IX, is excluded from the provisions of that Clause.

Another theory as regards the effect of Section 10, Regulation XIX of 1793, has been propounded.

Mr. Justice Norman says:—"If the zemindaries could have been immediately split up and sub-divided, and large portions of them disannexed from the parent estates by rent-free grants without notice to the Government, the security of the Government revenue would have been enormously imperilled. It may be said that if the zemindar made default, the whole estate might be sold, and the grantees of the zemindar would have no title as against the auction-purchaser. If such grants had been permitted, it is by no means clear that zemindaries, if sold, would have realized prices sufficient to cover arrears. There would have been great risk that the boundaries of zemindaries would have become confounded, and that, in almost every case, a purchaser at a sale for arrears of revenue would buy little more than a crop of lawsuits."

But a grant of a dependent talook or lease, whether a rent is reserved or not, does not disannex the lands included in it from the parent estate. The lands still remain a part of the estate liable for the revenue reserved for the estate, and to be sold with the remainder of the estate for any arrears of such revenue; and when sold, the lease or talook stood cancelled by virtue of Section 5 of Regulation XLIV of 1793. I cannot see what interest the Government could have in compelling the zemindar to reserve a rent; or how, if they had such an interest, it could be protected by compelling the reservation of a mere nominal rent.

As to the risk of confounding the boundaries of the zemindaries, I am at a loss to understand how the reservation of a nominal, or even of a substantial, rent would prevent such risk. Even if it would have done so, surely some better contrivance than that of encouraging fraud, and allowing the grantor or his heirs to commit the injustice of repudiating his own grant, might have been devised for that purpose.

It has been said by one of my honorable colleagues that "we are bound to administer tht policy of the law if we can discover it;" and he arrives at the

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conclusion that the whole policy of our revenue legislation is against the creation of rent-free grants.

With all respect for that opinion, the doctrine of administering the policy of a law appears to me one of the most dangerous that I ever heard propounded as a rule of construction.

We are bound to administer the law as we find it laid down, and not what we may imagine to have been the policy of the law-makers. We ought not to deprive a man of lands which he has purchased, and of which he and his ancestors have been in undisturbed possession for nearly half a century by administering the policy of a law, or of a system of legislation which is not expressed by the law-makers.

The policy of our revenue legislation is to secure the revenue. I trust that it is not to be carried out without regard to justice.

Who is to be the judge of what grants are, and what are not, against the policy of our revenue legislation?

Is it to depend upon the opinion of each individual judge, or only upon the declared intentions of the Legislature?

It was admitted by one of the learned Judges, who delivered judgment in the 2nd Full Bench case in 1865, that it might appear unjust and inequitable that any person should have a right to take advantage of his own wrong, and that grants made for consideration should be resumable by the party making them. But he added: "Perhaps the policy which dictated the law preferred to protect the rights of the Government without any regard to the hardship or injustice noticed above."

2 Weekly Reporter, Civil Rulings, page 22.

What man's property will be safe if such rules of construction be adopted?

Who is to decide whether it is against the policy of the revenue laws to allow a man for a valuable consideration to grant a lease at a nominal rent, and to repudiate all leases or grants which he himself has made if they are rent-free? Upon this point, various opinions are entertained by different Judges. For my own part, I hold that it was not against the policy of the revenue laws, or of the permanent settlement, to allow a zemindar to void his own or his ancestor's rent-free grants. If the Legislature has declared that all rent-free grants are void, we must administer the law as we find it, however much we may reject it and disapprove of the policy.

But the real question is whether, when the Legislature used the word "revenue," they meant "rent," or meant only that which they expressed.

Mr. Loch, in his judgment in the 2nd Full Bench case, says:—"The preamble (of Regulation XIX of 1793) clearly lays down the principle upon which the revenue was assessed, what part of that revenue was to be considered as rent (*viz*, the difference between the assets of an estate, and such portion of them as Government might think fit to appropriate), and it distinctly repudiates the zemindar's rights to make a grant exempt from the payment of revenue, such revenue necessarily comprising rent." (2 Weekly Reporter, Civil Rulings, page 20.)

The argument fails to prove, to my mind, that that portion of the assets of an estate which Government does not appropriate, and for which the zemindar was not bound to account, is revenue.

The argument is that the Regulation shows what part of the revenue was to be considered rent. The conclusion is that the part which was to be considered rent was intended to be included by the Legislature when they used the word "revenue."

If the Regulation shows what part of the assets is to be considered as rent, and what part as revenue, why are we to hold that the Legislature intended to include in the word "revenue" that which they intended to be considered as rent? Is it not more reasonable to suppose that the Legislature intended by the word "revenue" that part which was not rent, especially when, in the same Code, they use the word "rent" as something distinct from revenue? Mr. Justice Loch admits that the zemindar may remit his share of the rent; but he says he has

"no authority to remit any portion of the revenue, and therefore that a perpetual lease or a quit-rent which does not provide for the full quota of revenue from each beegah of land is as invalid as a rent-free grant."

If, as stated by Mr. Justice Loch, the difference between the whole assets of an estate, and such portion of them as Government thought fit to appropriate, was rent, rent was the part not appropriated by Government. How then could revenue, which was the part appropriated by Government, comprise rent, which was the part not appropriated by Government?

The argument assumes that when a zemindar has engaged for, and pays a certain sum fixed permanently as the revenue of an estate, the Government still retain a share in the rent or that part of the assets of an estate which they have not appropriated.

If this is so, what becomes of the declaration made at the time of the permanent settlement by Section 1, Regulation II of 1793, that the revenue payable to Government had not been fixed for ever.

If the assets or the sums paid by the ryots are part of the revenue, they surely had not been fixed for ever. It was the very object of the permanent settlement to induce the zemindars to improve their estates, and thus from to time increase the assets; and for this purpose the Government appropriated as revenue a fixed sum, and left the remainder of the assets to the zemindars. Before the permanent settlement the Government's share of the assets was liable to frequent variation. It may be asked, if Mr. Justice Loch's argument is correct, what part of the assets must be reserved as rent in order to prevent the grant from being exempt from the payment of revenue? If a question arises whether the share which belongs to Government of the assets has or has not been reserved under lease by a zeminder, how is that question to be determined? If it belongs to Government, one would imagine that when collected it must be paid over to Government. Yet no one will, I think, contend that a zemindar is bound to pay to Government any portion of the rents reserved under leases or grants of dependent talooks. I concur with Mr. Justice Loch that, if it is necessary to reserve a rent at all, it is not sufficient to reserve a mere nominal rent; but if it is compulsory upon zemindars to reserve a rent equal to that portion of the assets to which the Government would have been entitled if the lands had not been permanently settled, how is it to be asertained whether such a rent was reserved or not, when it is clear that before the permanent settlement the amount payable for revenue was fluctuating, and that depends upon the will of the Government? If a lease or grant, after a permanent settlement, is to be avoided by the grantor, because it does not reserve that which would have been the Government's share of the assets if the settlement had not been made, it will be impossible to ascertain whether such rent has been reserved or not. Even if it should be held sufficient if the rent reserved is equal to the full quota of revenue fixed by the permanent settlement for each beegah, inextricable confusion will arise; and it will be necessary in every case in which a grant or lease is disputed to raise an issue whether the amount reserved bears the same proportion to the actual produce of the land included in the grant as the assessment upon whole of the estate bears to the whole of its actual produce, and the trial of such an issue will involve the same enquiry as would be necessary if the grantee had had the proprietary right in the lands conveyed to him, and was applying for a butwarra; and this will be the case even if the grant comprised only a few beegahs or cottahs of land. Indeed, as it has been already shown, after a permanent settlement, no particular portion of the whole revenue is payable for any particular beegah, and even if it were so, it would be almost impossible, after extensive improvements in an estate, to say what proportion the revenue of any particular beegah of land bears to the whole assets of the estate. In the 2nd Full Bench case, the land in question was at the time of the permanent settlement a piece of low marshy land which yielded no assets. In such a case, it would be impossible to say what proportion of the revenue was payable for it.

Mr. Justice Shumboonath Pundit, with his great acuteness and experience,

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foresaw the difficulty, I may say the impossibility, of compelling a zemindar to reserve on every grant a rent equal to the full quota of revenue for each beegah of the lands granted, especially when no rent for such lands was paid at the time of the settlement. He said:—"During the progress of the decennial settlement, and in 1793, when the laws of that year were enacted, it was thought to be a sufficient check against acts supposed to be injurious to the public rights to declare that no grant or alienation should be made rent-free; and it was not considered at all expedient to rule that the rent reserved in a lease should be equal to the proportionate revenue due to the Government from the lands leased out. It was not an easy matter to fix this proportion, and it was not thought proper to impose such a troublesome condition, because it had already been ruled that the zemindars generally could not settle for more than ten years, and that fraudulent or wrongful settlements made by them were not binding upon auction-purchasers."

2 Weekly Reporter, p. 21.

I cannot discover what Mr. Justice Shumboonath Pundit relied upon when he stated that, when the laws of 1793 were enacted, it was thought to be a sufficient check to declare that no grant or alienation should be made rent-free. He must, I presume, have relied upon the authority of the Sûdder Court in Rajah Modhnaram's case, to which I have already adverted.

Mr. Justice Trevor, holding that a mere nominal rent was sufficient, had not to contend with the difficulty of deciding what amount of rent it would be necessary to reserve in order to prevent a grant from being void, under Section 10 as a grant exempt from the payment of revenue. He says:—"The mere fact of the land granted being unculturable at the time the grant was made, does not render that legal, which, under other circumstances, would not be so. The fact of its unculturableness was an accident of the moment; and as the land was a portion of the decennially settled estate, the whole area of which forms the security for the Government revenue, it could not be alienated revenue-free without the consent of Government. Neither can the fact of the grant being for the alleged benefit of the villagers render that legal which is illegal in consequence of its being to the detriment of the interests of the State."

2 Weekly Reporter, p 18.

The decision that a nominal rent is sufficient gets rid of the difficulty of deciding what amount of rent would be sufficient to prevent a grant from being a grant to hold exempt from the payment of revenue, if such grants are at all within the meaning of Section 10, Regulation XIX of 1793. But the decision is open to this palpable objection, that if a rent-free grant of lands of large value is void in consequence of its being detrimental to the State, or to the interests of the zemindar's heirs, such interests would not be protected by the reservation of a merely nominal rent.

A question also seems naturally to arise—Were Lord Cornwallis and his Council so short-sighted as not to see that there could be very little difference as regards the interests of the State, or those of the heirs of a zemindar, whether a grant was rent-free or subject to only a nominal rent?

Moreover, a zemindar has full power to assign, by way of gift, sale, mortgage, or otherwise, the rents of any of the dependent talooks or leases on his estate, or any portion of them. There is nothing in Section 10 which by any interpretation can be held to prohibit this, although the grants would, as against a purchaser at a sale for arrears of revenue, convey no interest in the rents of the estate to the grantee. What good reason could there have been to compel a zemindar to reserve some rent from the tenant on the grant of a talook or lease, when he could assign over to a third person the rent which he had reserved as soon as he had received it? How much better would the State or the heirs of a zemindar be, if the zemindar should grant a lease reserving a full rent, say of 10,000 rupees a year, for the lands, and should assign over the rent the next day to a stranger and his heirs for ever, than they would be if he were to grant a lease without reserving any rent at all?

Further, if, in consideration of a large premium, a zemindar should grant a

lease at a nominal rent of lands worth 10,000 rupees a year, he would be guilty of extortion if he should collect more than the nominal rent so reserved. (*see* Regulation VIII of 1793, Section 52) But if a lease rent-free of such lands is void under Section 10, Regulation XIX of 1793, he might, and indeed would be required by that Section to resume the lands, and could then let it for a full rent.

It was contended on behalf of the plaintiff, and it was held by some of the Judges in the 2nd Full Bench case, and it is the opinion of some of the Judges on the present Full Bench, that the word "revenue" was used in Section 10 Regulation XIX of 1793, as well as in the laws before the decennial settlement, to express either revenue belonging to Government or rent belonging to the zemindars, or, to use the words of Mr. Justice Campbell, "in a shifting and interchangeable sense, and sometimes synonymously to mean the same thing."

In the Regulations prior to the decennial settlement, no doubt the word "revenue" included rent, not because the same word was intended to refer to two different things, but because at that time the rents of lands were Government revenue. The Regulation of 1st December, 1790, in using the words "rent-free grants" included lakheraj grants or grants exempt from the payment of revenue to Government, because at that time if the rent was alienated, the revenue which belonged to Government was *in so facto* alienated.

I cannot find any inconstant use of the word "revenue" in Regulation XIX of 1793, or in any of the other Regulations of that Code, or any synonymous use of the words "revenue" and "rent."

The instances which have been specified, in which it has been asserted that the word "revenue" was used in the sense of the zemindar's rent do not, in my opinion, support the assertion.

The use of the word in Section 1 of Regulation XLIX of 1793, and in Section 11 of Regulation XIX of 1793, were the only specific instances given as regards the Code of 1793, in which it was said that the word "revenue" was used in a double sense.

Regulation III of 1828 was also referred to for the purpose of showing that the words "revenue" and "rent" were used synonymously, though that fact, if it had been so, could have but little bearing upon the question as to the sense in which the word "revenue" was used in Regulation XIX of 1793.

Mr. Justice Loch, in his Judgment in the 2nd Full Bench case, has very clearly shown that the word "revenue" as used in Section 11 Regulation XIX of 1793, refers to revenue in the ordinary sense of the word, and that it was used in that Section to denote the revenue on resumed lakheraj lands under 100 beegahs, which was given up to the zemindars by Section 6 of that Regulation, and was assessed under Section 9. It was revenue, and not rent, as a reference to Sections 6, 9, and 11 will show.

The words which are referred to in Regulation XLIV of 1793 are those in which it is said:—"It is essential at the same time that the proprietors of land should have a discretionary power to fix the revenue payable by their dependendent talookdars, and to grant leases, or fix the rents of their lands for a term sufficient to induce their talookdars, &c., to improve the cultivation of their lands," &c. The word "reveuue" is used in the passage above quoted in the same sense as that in which it is used in Section 2 Regulation XVII of 1793, by which zemindars are authorized to distrain upon their under-tenants and ryots and upon the talookdars paying revenue through them for arrears of "rent" or "revenue." The word "revenue" in both these Regulations, refers to the dependent talookdars mentioned in Regulation VIII of 1793, Section 6, who were to continue to pay their revenue through the zemindars. The word "revenue" both in Regulation XVII and in Regulation XLIV was therefore used in its ordinary and strict sense.

Regulation III of 1828 referred to grants of lands which the Government were entitled to resume, and necessarily referred to grants made prior to the 1st December, 1790, when, as I have already endeavoured to show, a grant rent-free was really and actually an alienation of the Government revenue.

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Mr. Justice Loch, in his judgment in the 2nd Full Bench, refers to the indiscriminate use of the word "revenue;" but he does not concur in that use of it. He says:—"Another element of confusion must be got rid of, *viz.*, the interpretation put upon the word "revenue" in Regulation XIX of 1793. It has been said that the word is used indiscriminately to mean either "revenue" or rent according to the context. This appears to be a mistake. The word 'revenue' is used in its proper meaning throughout the Regulation, and is not convertible with rent, though it comprises rent. A consideration of the purport of the law will at once show that the Legislature was dealing with a question of revenue only."

The word "revenue" and the word "rent" were used in the Code of 1793 in many places, as I have already shown, in order to describe two very different things; the former meaning Government revenue, the latter meaning the rents payable to the zemindars by their talookdars, farmers, and ryots.

It would, therefore, have been quite contrary to the rules contained in Regulation XLI of 1763 to use the word revenue as applicable to the zemindar's rents, or the word rent to express the Government revenue.

By Regulation XLI of 1793, it was enacted that in the Regulations the same designations and terms should be applied to the same descriptions of things, in order that rights, property, tenures, and generally all persons and things, should be uniformly described by the same designations and terms throughout the Judicial Code; and so careful was the Legislature with respect to this important subject that it was directed by Section 16 that, in translating the Regulations, the translator was to be particularly careful to preserve the same uniformity.

The Legislature knew full well what they were about, and therefore, in re-enacting with modifications the Regulation of 1st December 1790, they substituted the word "revenue" in Section 10 for the word "rent," which was used in the corresponding Section of the Regulation of the 1st December, 1790.

Notwithstanding this substitution of the word "revenue" for the word "rent," for which the Legislature must be supposed to have had some good reason; and notwithstanding the preamble and enactments of Regulation XLI of 1793, some of my honorable colleagues held that the word revenue was used in Section 10 of Regulation XIX of 1793 express two different things: one of them in particular says:—

"I am compelled to conclude that the word revenue at that time was not always employed to mean only the revenue demandable by Government, but that it was also loosely used to comprise the rent recoverable by the zemindar who was accountable for the revenue."

To arrive at such a conclusion, we must hold that the Legislature were themselves violating in Section 10 Regulation XIX of 1793 a rule which, by another Regulation of the same Code, Regulation XLI of 1793 passed on the same day, they declared to be essential to enable Courts of Justice to apply the Regulations according to their true intent and import. (*See* the preamable to Regulation XLI of 1793.)

But the use of the words "revenue" and "rent" in the same Code for the purpose of designating sometimes the same thing, and sometimes two distinct things, would have been not only a violation of the express rule laid down in Regulation XLI of 1793, but in contravention, as well of the principles by which scientific use of language is regulated, as of the rules of legal construction.

It was wisely remarked by Locke in his Essay on "The Human Understanding," speaking of the abuse of words, that "words fail to lay open one man's ideas to another's view: 1*st*, when men have names in their mouths without any determinate ideas in their minds, whereof they are the signs; 2*ndly*, when they apply the common received names of any language to ideas to which the common use of that language does not apply them; and, 3*rdly*, when they apply them very unsteadily, making them stand now for one, and by-and-by for another idea."

He points out how great is the concernment of every man as to the meaning of the laws which he is to obey, and which draw inconveniences upon him when he mistakes or transgresses them. "It is hard," he says, "to find a discourse written on any subject wherein one shall not observe, if he read with attention, the same words (and those commonly the most material in the discourse and upon which the argument turns) used sometimes for one collection of simple ideas, and sometimes for another, which is a perfect abuse of language. Words being intended for signs of my ideas to make them known to others, not by any natural signification, but by a voluntary imposition, it is a plain cheat and abuse when I make them stand sometimes for one thing, and sometimes for another."

I do not believe that either the Legislature of 1793, or the drafter of the Code of Regulations which was passed in that year, is open to the imputation of having used the word "revenue" in Regulation XIX of 1793 unsteadily in a double or shifting sense. It was the very object and intention of Regulation XLI of 1793 to prevent any such abuse of words, and the Legislature appear to have had the remarks of Locke in their minds when they framed that Regulation.

If any hardship and injustice has been caused from the use of the word "revenue" in Section 10, it is not, in my opinion, owing to the abuse of the word "revenue" by the Legislature or by the framer of the Regulation, but by the misuse of the word in the interpretation of the law.

I have already quoted a passage from Locke on the abuse of words. I will now refer to another passage from the same author on the subject of interpretation of words. He says (still speaking of the abuse of words):—"Nor hath this mischief stopped in logical niceties or curious empty speculations. It hath invaded the great concernments of human life and society, obscured and perplexed the material truths of law and divinity, brought confusion, disorder, and uncertainty into the affairs of mankind; and, if not destroyed, yet, in a great measure, rendered useless these two great rules, religion and justice. What have the greatest part of the comments and disputes upon the laws of God and man served for, but to make the meaning more doubtful, and to perplex the sense? What have been the effects of those multiplied curious distinctions and acute niceties, but obscurity and uncertainty, leaving the word more unintelligible, and the reader more at a loss? How else comes it to pass that princes speaking or writing to their servants, in their ordinary are easily understood; speaking to their people in their laws are not so? And as I remarked before, doth it not often happen that a man of an ordinary capacity very well understands a text or a law that he reads, until he consults an expositor, or goes to Counsel, who, by the time he hath done explaining them, makes the words signify either nothing at all or just whatever he pleases." Again, he says:—"There remains yet another more general, though perhaps less observed abuse of words and that is, that men having, by a long and familiar use, annexed to them certain ideas, they are apt to imagine so near and necessary a connection between the names and the signification in which they use them in, that they forwardly suppose one cannot but understand what their meaning is, and therefore are apt to acquiesce in the words delivered, as if it were past doubt, that in the use of those common received sounds, the speaker and hearer had necessarily the same precise ideas. Whence, presuming that, when they have in discourse used any term, they have thereby, as it were, set before others the very thing they talk of, and so likewise taking the words of others as naturally standing for what they themselves have been accustomed to apply them to, they never trouble themselves to explain their own, or to understand clearly the meaning of the others."

So it seems to have been in Rajah Modhnarain's case. The Judges, having been in the habit in resumption suits of treating rent-free grants made between the 12th August 1765 and the 1st December 1790 before the decennial settlement as illegal alienations of the Government revenue, appear to have assumed, as a matter of course, that the word "revenue" in Section 10

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Regulation XIX of 1793 must necessarily have been used by the Legislature in the sense in which they had been accustomed to apply it, and, consequently, that all rent-free grants were grants to hold exempt from the payment of revenue.

In construing a law, a Judge is bound to give effect to what he believes to be the intention of the Legislature. That intention however, must be collected from the words which the Legislature have used, and not from importing into the law, any of the Judge's own notions of policy or any ideas of his own as to what may or may not have been the general policy or intention of the Legislature. He ought not, as was stated by the Privy Council in the case to which I have referred, "to suppose that the Government intended to sanction a wanton and unjust disturbance of vested interests."

It was stated by the Legislature in 1793 that the consequence of the laws which were then enacted, "land must become the most desirable of all property." We ought not, without the clearest expression of the intention of the Legislature, to put a construction upon any part of that law which, to use the words of the Judicial Committee in the case cited, "will render the title to landed property necessarily uncertain": and thus to render it the least desirable investment for capital.

In Skerry *vs.* Lord Muskerry in the House of Lords, Lord Cottenham says:—"Courts of law and equity can discover the intention of the Legislature only from the terms used, and are not at liberty to speculate upon the existence of any intention not consistent with the plain and obvious meaning of such terms."

House of Lords Cases, page 593.

To use the words of Lord Brougham, "we must construe a statute by what appears to have been the intention of the Legislature, but we must ascertain that intention from the words used, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

Fordyce *vs.* Brydges, 1 House of Lords Cases, 4.

Mr Justice Campbell says:—"Hard cases make bad law;" but it must not be supposed that every decision which causes a hardship is necessarily good law. I wish I could say that no bad law had ever been made, except that which had its origin in an earnest desire to avoid a hardship.

We should bear in mind the words of Lord Bacon:—"Let Judges beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws." And again:—"Let no man weakly conceive that just laws and true policy have any antipathy," and that "the principal part of a Judge's office is a wise use and application of laws."

I have not alluded to Regulations V and XVIII of 1812, which repealed Section 2 of Regulation XLIV of 1793, and by which zemindars were declared competent to grant leases for any period which they might deem most convenient to themselves and their tenants, and most conducive to the improvement of their estates. Those Regulations having been passed long after the Code of 1793 could have no material bearing upon the question as to what was the real intention of the Legislature in 1793.

The question, however, under consideration, is most important as regards leases granted under the provisions of Regulations V and XVIII of 1812, for if leases not exceeding 10 years were rendered void by Section 10 of Regulation XIX of 1793, if no rent was reserved, leases or other grants made under the subsequent Regulations for periods exceeding ten years, or in perpetuity, are also void if no rent is reserved. If it were necessary to reserve some rent in those grants or leases which, by virtue of Section 2 of Regulation XLIV of 1793, could be made only for a term not exceeding ten years, it was equally necessary to reserve some rent in those leases which, on account of the purposes for which they were made, were allowed by Section 8 of that Regulation to be granted for any term or in perpetuity; so with regard to all leases which have been or may be granted under Regulations V and XVIII of 1812. If the decision of Mr. Justice Trevor is correct, every grant in fee-simple by a zemindar or putnéedar in which a nominal rent at least has not been reserved, is null and void.

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The purchase-money for the lands in the present case was not large, the sums paid for the several grants varying from 200 rupees to 100 rupees and less; but that does not affect the principle. The small property involved in this decision is probably as important to the defendant as his vast possessions are to the richest and proudest nobleman in the country. They are probably his birth-right and inheritance, upon which he and his family are dependent, and of which the resumption may reduce them from comparative comfort to want and penury.

It is my duty to give this case as calm and deliberate and careful a consideration as if the property were worth lacs of Rupees. The case will form a precedent for the future upon a most important subject, and much injustice may be caused by an erroneous decision. I have never entertained the slightest doubt upon the question; but, considering that so many of my honorable colleagues entertain a different opinion, I have gone more fully into the case, and expressed the reasons for my judgment at greater length than I otherwise should have done.

Since the 2nd Full Bench case was decided, I find another case in which land granted rent-free for a tank was held liable to resumption. (*See* Gopeenath *vs.* Banee Madhub Banerjee, 2 Weekly Reporter, Civil Cases, p. 296.)

In that case, a Division Bench of this Court held that a tank granted rent-free subsequently to the permanent settlement was liable to resumption, there being nothing to show that it was the intention of the grantor that the tank should be a public benefit; and the Judges in that case expressed an opinion "that it was not desirable that the doctrine upon which the grant in the 2nd Full Bench case was upheld should be strained or carried too far."

It is said by Mr. Justice Trevor that "the grantee may have a remedy against the grantor in some form or other."

What that remedy is, is not pointed out; and from the use of the word "may," it seems very doubtful whether my late honorable colleague who made the suggestion was very certain in his own mind that any remedy actually existed. It is evident that he had no very clear conception of the mode in which the remedy was to be obtained.

For my own part, I cannot see what remedy the grantee or his heirs could have if the heirs of the grantor be held entitled to resume the lands, and to evict them after an undisturbed possession of nearly fifty years. At any rate, I should feel for a man who should be deprived of his estate under such circumstances, and be driven to seek for a legal remedy in the Courts of Judicature, commencing with the Court of original jurisdiction in the Mofussil, and probably, after long litigation and harassment, ending with a special appeal to this Court in which various opinions would probably be entertained.

A zemindar may have sold lands to be held rent-free for a term of years in order to raise money to improve other parts of his estate, and may have expended for that purpose every rupee of the purchase-money which he received; or he may have let lands rent-free for a term of years upon condition that the tenant should clear jungle or otherwise improve them; or he may have sold them for a long term of years for the purpose of erecting houses or manufactories, or other buildings upon them, and he may have expended the purchase-money in improving his estate; or he may have granted lands rent-free for a term of years, or for the life of a particular individual, or absolutely, in order to make provision for a wife or daughters or other dependants, or for the purpose of erecting and maintaining a school, or a scholarship, or a hospital, or for some other charitable purpose. The zemindar himself may be too honest and too honorable to invalidate his own grant and to resume the lands; but if the construction put upon Regulation XIX of 1793 by some of my honorable colleagues in this case is correct, it will be compulsory upon the manager of his estate, if he should become disqualified by insanity, or for any other cause, to resume the lands, to treat the occupiers as trespassers, and to turn them out of possession. The zemindar may die leaving his heir a minor, and the Court of Wards may be compelled to resume the lands, or he may die leaving a son

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less scrupulous and honest than himself, and such heir will be enabled to frustrate the intentions of his father and to resume the lands, although he may, in some of the cases supposed, have received the whole benefit of the purchase-money expended by his father in improving the other parts of the estate which has descended to him.

If Mr. Justice Trevor is correct in holding that the Section extends to grants in fee-simple and to grants of proprietary rights in a portion of an estate, the above remarks will apply to all cases of the transfer of such proprietary rights for purposes such as those abovementioned, and even to all absolute or conditional sales in fee-simple of parts of an estate upon which no rent is reserved.

The grantee may, in addition to the purchase-money which he paid, have expended large sums in improvements; he may have counted upon the property which he purchased as a provision for himself and his family; and yet, according to the construction contended for, he is liable to be treated as a trespasser, to be turned out of possession by the grantor or his heirs, and to be exposed to all the misery, to all the harassment, and to all the torture of finding, perhaps, in his old age, that he is destitute, or, upon his death-bed, that he is penniless, and that his wife and family are to be turned out of the dwelling-house which he had erected for their comfort, and to be cast adrift upon the world without any provision for their maintenance; and all this on account of some imaginary general policy of our whole revenue legislation which is not expressed by the Legislature, and of some unknown and undeclared theory of the permanent settlement of which he was not aware, and had no means of acquiring a knowledge.

In this very case the grants now sought to be set aside were made before the decision in Rajah Modhnarain's case, and when, according to the earlier decisions of the late Sudder Court, such grants were valid.

If it had been expressly desired that a zemindar should not be allowed to grant a lease or a dependent talook without reserving a rent, either nominal or equal to the actual value of the land, I should not attempt to set up my own views of policy against the declared intentions of the Legislature. I have to determine what the law is which the Legislature has enacted, not what it ought to be, or whether it is just or unjust. But I am to judge of the intentions of the Legislature from the language which they have used; and without the clearest and most unambiguous expressions, I cannot attribute, nay, I may say, I cannot impute, to Lord Cornwallis and to the distinguished men who formed his Council, a policy so narrow-minded, so obstructive of progress, so short-sighted, so mean and paltry, so utterly at variance with all the solemn declarations of Government, so fraught with injustice, and so conducive to fraud, as that which has been contended for on the part of the plaintiff.

I hold that Section 10, Regulation XIX of 1793, does not apply to rent-free grants made by a zemindar after a permanent settlement of his estate; that there is no law which prohibits a zemindar from making rent-free grants of permanently settled lands, whether such grants are intended to pass the whole proprietary rights in the lands, or merely to create dependent talooks or leasehold interests; and that neither he nor his heir, nor any person claiming through him, can invalidate such grants, or resume the lands, or compel the occupiers to pay rent for them.

I am glad that I have been able to arrive at this conclusion, and I rejoice that, having regard to what I conscientiously believe to have been the real intention of the Legislature, I am able to pronounce a judgment consistent with justice and right.

The minutes of the three Judges which were sent to the Registrar having been held not to be judgments, and the remaining Judges of the Full Bench being equally divided in opinion, the opinion of the Chief Justice will prevail, according to the provisions of Section 36 of the Letters Patent. The cases will be sent back to the Division Bench, which will be informed that a rent-free grant made by a zemindar of a specific portion of land, after a permanent settlement of the estate to which it belongs, is valid as against the grantor and his heirs, or a purchaser by private sale of the estate.

Application for Review of Judgment in Regular Appeal No. 309 of 1866.

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CASE 204 OF 1867.

Bissessur Chuckerbutty and others, (Defendants) Appellants, *Petitioners, versus* Seetul Chunder Chuckerbutty, (Plaintiff), Respondent, *Opposite Party.*

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. Tagore and *Baboo Bungshee Dhur Sein* for Petitioners.
Baboo Sreenath Doss for Opposite Party.

To entitle the recoverer of property which had been lost to the family to the extra and separate share of one-fourth allowed him by Hindoo law, the property must have passed into the hands of strangers, not merely into those of one claiming, though wrongly, to be a member of the family.

Such recovery must be *bonâ fide*, and not in fraud of co-heir's title.

Macpherson, J.—We are asked to review our judgment in this case, on the ground that the defendants (the applicants for the review), at their own expense and by their exertion, recovered the property of Shib Soondure from the wrongful possessor, Ram Chunder, by a separate suit, and that therefore we have erred in not, in the first instance, giving a fourth of the recovered property to the defendants, and declaring the plaintiff entitled to only a half-share of the residue.

There are various grounds, in addition to that relied upon by us in our judgment, on which we think that the conclusion at which we arrived was correct, and that no review ought to be granted.

In the first place, it appears to us that this is not a case of the recovery of property which has been lost within the meaning of those texts of the Hindoo law which provide for a fourth share being allotted to the recoverer. The property in suit was never, in fact, lost to the family, for Ram Chunder held it, not as being a stranger, but as being the adopted son of Shib Soondure, and upon the one question of his being or not being her adopted son, his whole title admittedly turned.

The Hindoo law on the subject of "recovered" property does not, in our opinion, apply to cases such as this,—cases merely of disputed inheritance; it applies to cases where the property has been seized by others, or lost,—cases in which it has passed from the family to strangers, and has been held by them adversely to the family, and not merely under an alleged (though unfounded) title as members of the family.

In the Dyabhaga, (Chapter VI, Section 2, Clause 31,) referring to the recovery by the father of lost property inherited from the grandfather, it is spoken of as property "which has long been lost." And in Clause 34 we find the following:—"Vrihashpati says—'Over the grandfather's property which has been seized (by strangers), and is recovered by the father,'" &c. Clause 38 is as follows:—"Saukha propounds a special rule regarding land:—'Land inherited in regular succession, but which had been formerly lost, and which a single heir shall recover,'" &c. So the Dya Krama Sangraha (Chapter 4, Section 2, Clause 6,) says:—"So Yajnyavalkya:—'Ancestral property which had been before usurped by any one, and afterwards recovered by an heir,'" &c. And (Clause 8) he has stated a special rule regarding land:—"Land inherited in regular succession, but which has been formerly lost, and which a single heir shall recover," &c.

In Sir William Jones's translation of the Institutes of Menu, (Chapter IX, Clause 209,) the rule, which is probably the foundation of all the subsequent texts, is thus stated:—"If a son by his own efforts recover a debt or property unjustly detained, which could not be recovered before by his father, he shall not, unless by his free will, put it into parceny with his brethren, when, in fact, it was acquired by himself."

No doubt some of these texts are of general application, and do not relate specially to the recovery of land. But all of them have a bearing on the question; and looking at them together, we have no doubt that they were all of them meant to apply to cases in which the property recovered (whatever its nature) had actually passed away from the family into the hands of strangers.

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In the next place, it is not proved that the property which is the subject of this suit was, in fact, "recovered" by Bissessur as alleged. The plaintiff instituted his suit some six months before the High Court decided, in the appeal in Bissessur's case, that Ram Chunder had not proved himself to be the adopted son of Shib Soondaree. The plaintiff in his plaint alleges Ram Chunder to be in possession. Ram Chunder, by his written statement, impliedly admits that he is so, and Bissessur nowhere in his written statement states that he is himself in possession. The mere obtaining a decree for possession would not, as it appears to us, be in itself "recovering" the property.

Finally, we find that the "recovery," if not made with the privity of the co-heirs, must at least have been *bonâ fide*, and not in fraud of their title, or by anticipating them in their intention of recovering the lost property. (*See* Strange, Vol. I, p. 217, 2nd Ed.) And in Halhed's Gentoo Code, which was quoted by the learned Counsel who supported the application for a review of our judgment, the same principle is expressly laid down. The rule is thus given (Chapter II, Section 9, page 79 of the edition of 1776):—"If, in the same manner, by permission of the partners, one of them occupies any glebe land of his father and grandfather, then he shall divide such glebe into four shares, and from them he shall first take to himself one share, and afterwards divide the three remaining shares equally between himself and his partners" (See also Colebrooke's Digest, Book V, Chapter 5, Section 2, para. 359, and the comments by Jugganatha.)

Bissessur, in his suit against Ram Chunder, chose to ignore his co-heir, the plaintiff in the present suit, and acted throughout antagonistically to, if not in fraud of, the rights of the plaintiff. Under such circumstances, even if Bissessur had "recovered" the property, he would not have been entitled to retain, in the first instance, a one-fourth share by way of remuneration for having recovered it.

On the whole, we are of opinion that we decided rightly in holding that the defendant Bissessur and his brothers were entitled to only an eight-anna share of the property inherited from Haredhun on the death of Shib Soondaree, and we reject this application with costs.

CASE 1728 OF 1867.

6th January.

Special Appeal from Gyah.

Joy Prokash Singh, (one of the Defendants) *Appellant, versus* Ameer Ally (Plaintiff), and Government (Defendant), *Respondents.*

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J.

Messrs. R. V. Doyne and *C. Gregory*, and *Baboo Motee Lall Mookerjee* for Appellant.

Mr. G. C. Paul for Plaintiff, and *Baboo Kishen Kishore Ghose* for Government (Defendant), Respondent.

Quære.—Whether adverse and uninterrupted possession of an easement for twelve years would, in the Mofussil, confer a right thereto.

Peacock, C. J.—The proceedings in 1841 under the Act IV case, which was between entirely different parties, and the map used on that occasion, are clearly not evidence either for or against either of the parties in this suit. The Judge has used and attached great importance to them. He says:—"To me the proceedings, and especially the map in the Act IV case of 1841, make it quite clear that this bund was not then in existence; and this being so, away goes the defendant's plea of prescription."

The case must be remanded to be determined upon the merits, without reference to that map or the proceedings of 1841.

The suit was commenced in March, 1866, and the bund might therefore have been more than twenty years old when the suit was commenced, even if the Judge is right in his conclusion that it did not exist in 1841. When the Judge says that the proceedings in 1841 make it quite clear that the bund

was not then in existence, and this being so, away goes the defendant's plea of prescription," he seems to show that, in his opinion, prescription in the Mofussil and prescription in England are the same. This, however, is not so.

The defendant merely says that the bund was kudeemee or ancient. The Judge should find whether it was ancient or not; that is to say, whether it was so ancient as to confer a right. The plaintiff could not sue to have the bund removed, if the defendant had exercised the right of having it in the state in which it existed at the time of the commencement of the suit for a period of twelve years previously.

In England an easement may be claimed by non-existing grant after it has been used adversely and uninterruptedly for a period of twenty years, and the period of twenty years in many cases confers a right under the English Prescription Act.

That Act, however, does not apply to the Mofussil here, and there is no magic in the number 20.

I am inclined to think that, by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for twelve years would confer a right to it. But it is premature for us to decide the point in this case. The point has not been argued, and any decision at present upon that point would at most amount to a dictum.

The Judge on the re-trial, in determining whether the bund is ancient or prescriptive, should define the sense in which he uses those words, so that, if necessary, the law may hereafter be applied to what he may find to be the facts of the case with reference to the period for which the bund has been used adversely and uninterruptedly.

Special Appeal from Rungpore.

CASE 1788 OF 1867.

8th January.

Khemamoyee, *alias* Khemessuree Dabea, and others, (some of the Defendants) *Appellants*, *versus* Shusee Bhoosun Gangooly and another (Plaintiffs), and Juggendro Narain Chowdhry and another (Defendants), *Respondents*.

Before *Peacock*, C. J, and *Dwarka Nauth Mitter*, J.

Baboo Gopal Lall Mitter for Appellants.
Baboo Kishen Sukha Mookerjee for Plaintiffs, Respondents.
Baboos Sreenath Doss and *Kishen Dyal Roy* for Defendants, Respondents.

Where the boundaries of three dependent talooks have, through their being long in one party's possession, become so confused as to be unascertainable, the Court will, on necessity being shown, direct an equitable division of the lands to be made in such manner that the produce of the total quantity of land to be included in each of the talooks so to be defined shall bear the same proportion to the jumma payable for such talook as the produce of the whole of the said lands bears to the total jumma payable on account of the three talooks.

Peacock, C. J —This is a special appeal, and we are not to interfere with the facts as found by the Judge, but to apply the law to those facts.

It appears that there were three talooks, Oottum, Ramnath, and Joykissen, which, in 1788, were paying distinct revenues to Government, and those three talooks are now on the serishta of the zemindar of Munthana, who receives the revenues for them. There can be no doubt, to my mind, therefore, that as the zemindar is entitled to collect the revenue of these three talooks, they were at the time of the permanent settlement dependent talooks in respect of which, by a distinct engagement with the zemindar, the revenues were to be paid through him within the meaning of Regulation VIII of 1793 The zemindar being assessed at the time of the permanent settlement for the zemindary of Munthana, is entitled to the revenue of these three talooks. Under these circumstances, a difficulty which suggested itself to my mind in the course of the argument that the Government ought to have been made a party to the suit, does not arise. All the parties interested are before the Court, the zemindars who are entitled to collect the revenue having been made parties to the suit

It seems that the three talooks, though subject to the payment of different amounts of revenue, and being separate talooks, have for a long time been in possession of the same person, and ultimately in the possession of Premomoyee's husband, and after his death in the possession of Premomoyee herself. In consequence of the three talooks having been occupied by the same person,

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the boundaries of the three have become confused, and it is now substantially found by the Judge that it is impossible to distinguish one from the other.

It appears that a portion of Oottum was sold to the defendants at a public sale under an execution against Premomoyee, to whom the property appears to have gone upon the death of her husband, and that afterwards the remainder of that talook was sold and purchased by the defendants under another execution against her, and that, subsequently, talooks Ramnath and Joykissen were sold and purchased by the plaintiffs. It further appears that in 1857, when the Government survey of these lands was made, the three talooks being then held by one person, and the boundaries of them not being ascertainable, they were included in one boundary on the survey map and in the register which was made at the time the lands in Ramnath and Joykissen were described as included in those which were set opposite to Oottum.

It is found by the Judge that the lands which formerly comprised the three talooks now bear the name of Oottum only; but that, when the defendants purchased Oottum, they did not purchase the lands which are now included under the name of Oottum, but only those lands which were included in the talook Oottum, for which the revenue of rupees 519 was payable.

It was contended by the defendants that the plaintiffs never got possession of Ramnath and Joykissen, and that as the defendants had purchased the whole of Oottum, the plaintiffs, in fact, purchased nothing. That would have been correct if what the defendants purchased was that which in the survey was designated as Oottum, but it is not correct if the defendants purchased only the lands included in the original talook Oottum, though they took possession of all the land which was included in the name of Oottum in the survey map. The defendants then being in possession of the lands which are comprised in the talook Oottum which they purchased, as well as those which were comprised in the two talooks which were purchased by the plaintiffs, and as the talooks cannot be distinguished from each other. the plaintiffs seek to have the boundaries of these several talooks fixed and distinguished, and to be put into possession of Ramnath and Joykissen.

We are bound to determine according to the principles of equity, justice, and good conscience; and if there were no decisions upon the subject, it would appear to us to be consistent with equity that when a person has occupied three different estates as a tenant or dependent talookdar for a long period, and has allowed the boundaries of those estates to become so confused that the one cannot be distinguished from the other, the three estates ought, when necessity arises, to be divided according to an equitable principle of division; but the case does not depend merely upon that theory, for we have the authority of the Civil law, and also the authority of the Courts of Equity in England, as a guide for our decision in this case. We find that, in equity, if, through the default of a tenant or a copyholder who is under an implied obligation to preserve the boundaries of separate estates which he holds, there arises a confusion of boundaries, the Court will interfere as against such tenant or copyholder to ascertain and fix them.

In the case of Willis and Parkinson, 2 Merivale, 507, to which I referred in the course of the argument, in a case by a prebendary against the lessee of prebendal lands, who was also the owner of lands within the parish in which the prebendal lands were situate, and had allowed the lands of the two estates to become intermixed and confounded by reason of his unity of possession, the Court decreed that "the respective boundaries of the prebendal lands, and of those which belonged to the defendant, should be ascertained, and that the land should be distinguished and divided by metes and bounds, and that if, by reason of the confusion of boundaries or alteration of names, or any other circumstances, the Commissioners appointed to set out the boundaries should not be able to distinguish and ascertain the said prebendal lands, or any of them, they should, in that case, set out such quantity of lands which were then in the possession of the defendant as might be of equal value with the prebendal lands, or so much thereof as could not be distinguished or ascertained."

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There are other authorities upon the subject which will be found referred to in Story's Equity Jurisprudence, Chapter XI.

The Judge was wrong in awarding a butwarah, if that word was used in its ordinary meaning; but the Judge probably intended to do that which we think it necessary to do, and to express in more precise language than he has done.

We therefore think that the following decree should be substituted for that which was given by the Judge, *viz*, that it be declared that the land described in the mouzawar register of Munthana, Zillah Rungpore, by J J. Pemberton, Esquire, Revenue Surveyor, in the years 1857 and 1858, opposite Mouzah Oottum, No. 146, are the lands comprised in the three talooks—Oottum, Joykissen, and Ramnath—referred to in this suit, and that it be decreed that the boundaries of those talooks be severally defined and fixed by a Civil Court Ameen to be appointed by the first Court in such manner that the produce of the total quantity of land to be included in each of the talooks so to be defined shall bear the same proportion to the jumma payable for such talook as the produce of the whole of the said lands bears to the total of the jumma as payable on account of the said three talooks, and that, for this purpose, the jumma of talook Oottum be taken as rupees 519-7-10, the jumma of talook Ramnath as rupees 105-0-5, and the jumma of talook Joykissen as rupees 193-12-5 gundas.

It is unnecessary for us to word our decree in the manner in which the decree was drawn up in the case to which I have referred, as in that case the Commissioners were ordered "to set out the prebendal lands if they could be ascertained; but if they could not be ascertained, then," &c. In this case it has been found by the Judge that the boundaries cannot be ascertained, and it is therefore only necessary for us to do what ought to be done upon that assumption, and not refer to the Ameen to ascertain that which the Judge has already determined to be unascertainable. The plaintiffs are entitled to something beyond having the boundaries ascertained. They are entitled to have possession of the talooks Ramnath and Joykissen as soon as the boundaries shall have been ascertained. Our decree therefore will proceed to direct that the plaintiffs be put into possession of such of the lands as may be included within the boundaries of talook Ramnath and talook Joykissen as are in the possession of the defendants Khemamoyee, Kishoree Debea, and Kisto Churn Roy, or any of them.

But, further, the defendants being in possession of the three talooks may abstain from paying the revenue of Ramnath and Joykissen. The plaintiffs may be unable to pay the revenues in consequence of their being kept out of possession of the rents by the defendants. It is therefore necessary, in order to do complete and substantial justice, that the defendants should not be allowed to remain in possession of the three talooks pending the ascertainment of the boundaries. We therefore order that a receiver and manager be appointed by the Court of first instance, and that possession of all the lands above described, or such of them as are in the possession of the defendants, be put into the possession of the receiver, with power to collect the rents and profits, and to apply the same in discharge of the jumaas payable for the said three talooks, and the charges of such collection and management; and the Court will fix such commission as may be thought reasonable and just to be paid to such receiver, and take such security as may be thought necessary for the due performance of his duties.

With regard to that portion of the defendant's appeal which relates to the costs of appeal to the Judge of the zemindars who were co-defendants, we think that that part of the Judge's decree which orders them to be paid by the present appellants should be reversed; and considering that, as far as the plaintiffs are concerned, the decree of the Judge has been substantially affirmed, we think that the defendants, appellants, ought to pay the costs of this appeal of such of the respondents as were plaintiffs in the suit, but not of the zemindar respondents, inasmuch as that part of the decree which relates to the zemindars' costs has been reversed.

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We would remark that, although we have no power to compel the parties to come to an amicable settlement, they will probably be consulting their own interests by at once having the boundaries set out amicably, and adjusting their differences without further litigation.

CASE 406 OF 1867.

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Special Appeal from Shahabad.

Chutter Lall Singh, (Plaintiff) *Appellant, versus* the Government, (Defendant) *Respondent.*

Before Peacock, C. J., and *Dwarka Nauth Mitter*, J.

Baboo Otool Chunder Mookerjee for Appellant.
Baboo Kishen Kishore Ghose for Respondent.

Moveable property washed on to a person's estate, and taken possession of by him in default of the original owner, is not unclaimed property, such that the Police can remove it from the finder's possession summarily.

Whether the finder can establish a right to such property as against the Crown, will depend upon the fact of his long-continued and adverse possession of such a right.

Peacock, C. J.—The plaintiff in this case sues the Government, and seek- to recover damages for some timber which was taken away by the Govern ment, and he claims that property, not as being the original owner of it, but, by reason of its being property of some unknown person which has been washed away by the river Soane, and floated on to his zemindaree. He says that this timber having been washed on to his estate became his property, and he claims to be entitled, by way of damages, to the value of the timber, and asks to have his right declared, as against Government, to all timber that in future may be washed on to his estate under similar circumstances. If he had sued merely for the value of the timber, the case would have been one of a nature cognizable by a Small Cause Court, and the value of the timber being under 500 rupees, a special appeal to this Court could not have been maintained. But a suit to have a right of this nature declared is not one which is cognizable by a Small Cause Court, or ever could have been intended to have been referred to such a jurisdiction.

If the plaintiff claimed this property under a right such as that to which I have referred, then it is clear that the property was not unclaimed property within the meaning of Section 25 and the following Sections of Act V of 1861 (B. C.); it would be no more unclaimed property, so far as a Police Officer was concerned, when claimed by the plaintiff, than it would have been if this zemindary had been held khas by Government, and the timber had been claimed by a Government officer.

The Principal Sudder Ameen, as I understand his judgment, decided that a right to property of this description could not be proved merely by witnesses, but that some documentary evidence must be produced in support of it, or some decree or decision of a competent authority establishing the custom. In this I think he was wrong. Rights to wrecks and other things, which belong to the Crown by virtue of its prerogative, may be, and frequently are, claimed by the lords of manors as being appurtenant to their manors; and in support of such claim it is not necessary to prove an actual grant, but the claim may be established by long-continued and adverse assertion of a right, and the enjoyment of property under such claim. I do not mean to say that the plaintiff can make out any title of that kind, but still he is entitled to have the question tried, and the case must be remanded to the Principal Sudder Ameen to try whether, by the evidence adduced in the cause, the plaintiff has or has not made out any such right as that claimed by him.

Special Appeal from East Burdwan.

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CASE 1395 OF 1866.

Shama Churn Chowdhry and others, (Defendants) *Appellants, versus* Bindabun Chunder Roy and another, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Kemp*, *L. S. Jackson*, *Macpherson*, and *Glover*, J. J.

Baboo Onoocool Chunder Mookerjee for Appellants.
Baboos Romesh Chunder Mitter and *Umbica Churn Banerjee* for Respondents.

This case was referred to the Full Bench under the following orders recorded by Kemp and Glover, J. J., on the 3rd June, 1867.

This was a suit for resumption, and was decided against the ryot on his failing to establish his lakheraj title.

More than two years after (the Full Bench Ruling of this Court in the case of Thakooranee Dassee having, in the interim, explained the meaning of the law in resumption suits) the ryot applied to the Sudder Ameen (not the same officer who had given the previous decision) for a review of judgment, and the Sudder Ameen, holding that there was good and sufficient cause shown for the delay, admitted the application, and on it reviewed and reversed his predecessor's judgment, following the precedent laid down in the Full Bench Ruling referred to above.

On appeal, the Principal Sudder Ameen held that the mere fact of a new exposition of the law having been made by the High Court, was no good reason for admitting an application for review after ninety days had elapsed from the date of the original judgment. He also held that the Lower Court was not justified in reversing the original decision on the strength of a ruling which was not in existence at the time that decision was passed.

This decision of the Principal Sudder Ameen is in accordance with one of a Divisional Bench of this Court, dated the 17th August, 1866, (Onoop Chunder Paul *vs.* Ekkowree Singh, II Wyman's Reporter, 180); but as we are not prepared to assent to the ruling there laid down, we refer the question for the authoritative opinion of a Full Bench.

There are two questions involved —

First.—Who is the authority to decide what is "just and reasonable cause" for admitting an application for review after the prescribed ninety days have elapsed? (Section 377, Act VIII of 1859); and, *second*, the application being admitted, is not the case in all respects a new one, and liable to be governed by any exposition of the law by a Full Bench Ruling of the High Court which may have been published since the date of the original decision?

It appears to us that the Court passing the decree is the only authority to decide what is and what is not just and reasonable cause for a delay of more than ninety days; and that, whether its reasons for allowing the indulgence be good or bad, there is no appeal from them; and this seems to follow from the wording of Section 378 of the Code; for if an order of Court admitting or rejecting a review be not subject to appeal, there is no reason why the preliminary question of time should be so subject either. If the Court's order is final in the one case, it must be so in the other.

We think therefore that a Court of Appeal has no jurisdiction to interfere with a Lower Court's discretion in the matter of time.

On the second point, we are of opinion that where a Lower Court has, for what it considers to be "good and sufficient reasons," admitted a review, the case is, to all intents and purposes, re-tried, and that there is nothing to prevent the Court from applying to the case any precedent of authority which may have been promulgated since the date of the original decision. A Full Bench Ruling does not make new law, but expounds the meaning of what is already existing.

No doubt, it may be objectionable that cases long ago decided should be

When an application for review is made after ninety days from date of judgment, the order of the Court for the reception or rejection of the application is open to appeal. If the application be properly received, that is, upon good cause being shown for the delay in presenting it, there is no appeal from the subsequent order of the Court granting or refusing the review.

The fact that since the original judgment was pronounced a Full Bench has given a new exposition of the law, is no good ground for admitting an application for review after time. If, however, the review have been properly granted, the Court is bound, in trying the case, to apply the last exposition of the law.

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liable to alteration or reversal in review; but there appears to us nothing in law which forbids a Court passing a decree from afterwards reviewing its order at any subsequent time on "just and reasonable cause" being shown for the delay in the first instance, and for "good and sufficient reason" on the merits of the decision itself. And in neither case does it appear to us that an Appellate Court has jurisdiction to interfere. The decision thus come to would of course be appealable, but not the grounds on which the case was allowed to be re-heard.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J. (*Kemp, J, concurring*).—In this case plaintiff sued to resume invalid lakheraj granted subsequently to the 11th December, 1790.

On the 28th of April, 1863, he obtained a decree in his favor. No appeal was preferred against that decision, which was in accordance with law as it had been expounded by the late Sudder Court.

Some time after the decision of the 28th April, 1863, a case was decided by a Full Bench of this Court (Sonatun Ghose *vs.* Moulvee Abdool Furow, II Weekly Reporter, page 205), which expounded the law differently from the mode in which it had been laid down in previous decisions of the late Sudder Court. In consequence of that decision of the Full Bench, the defendant, against whom the decree of the 28th April, 1863, was passed, applied to the Sudder Ameen to review his decision. The Sudder Ameen at that time was not the person who had decided the case originally, but was a new officer who had succeeded him. The application for review was made long after the expiration of ninety days from the date on which the decision had been given, the Full Bench decision not having been given within that period. The Sudder Ameen admitted the review; but it does not appear upon what grounds he considered that the delay was excused. Having admitted the review, it appears to me that he very properly acted upon the exposition of the law by the Full Bench, because at the time, when he reheard the case, he was bound to act upon the law as laid down by the Full Bench case, which did not alter the law as it existed at the time when the cause of suit arose, but amounted merely to a new exposition of the law itself.

An appeal was preferred from the decision of the Sudder Ameen, and was heard by the Principal Sudder Ameen. He thought that the Sudder Ameen was wrong in applying the new exposition of the law to the old case; he thought that the new exposition of the law was prospective, and not retrospective. He went further and decided that the Sudder Ameen was wrong altogether in admitting the review after the expiration of ninety days without sufficient cause; and he held that the fact of the defendant not being aware of the law as newly expounded by the Full Bench was no excuse for the delay. A special appeal was preferred from the decision of the Principal Sudder Ameen, and upon that the case has been referred by a Division Bench to a Full Bench to decide two questions:—*First*, who has the authority to decide what is just and reasonable cause for admitting an application for review after the prescribed ninety days have elapsed under Section 377 of Act VIII of 1859? and, *secondly*, the application being admitted, is not the case in all respects a new one, and liable to be governed by any exposition of the law by a Full Bench Ruling of the High Court which may have been published since the original decision.

With regard to the second question, I have already expressed my opinion that if the Sudder Ameen was right in admitting a review, he was right in acting upon the new exposition of the law.

The only remaining question then is whether the Sudder Ameen was right in admitting the review after the expiration of the ninety days; and if he was wrong, whether the Principal Sudder Ameen or this Court can deal with his decision. That, as it appears to me, depends upon the construction of Act VIII of 1859 under Chapter XI. The Sections principally bearing on the case are 377 and 378. Section 377 says:—" The application shall be

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made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period." Section 378 says:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final."

Now it appears to me that, in substance, there are two orders in this case:—*First* the order that the application shall be received; and, *secondly*, the order granting the review. We are now dealing with the first order, which, although not formally drawn up, is substantially included in the case. Section 363 of the Act says that no appeal shall lie from any order passed in the course of a suit, and relating thereto prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case, or the jurisdiction of the Court, may be set forth as a ground of objection in the memorandum of appeal.

It appears to me that the order admitting the application after the ninety days was an order prior to the decree upon the rehearing of the case upon review, and therefore, under Section 363, that order was appealable, unless Section 377 has left it wholly in the discretion of the Court to admit a review after the expiration of ninety days, whenever that Court shall think a reasonable excuse for the delay is made out. It is suggested by my honorable colleague by my side that there was no ground of appeal before the Principal Sudder Ameen that the Sudder Ameen was wrong in admitting the review after the expiration of ninety days, but the Principal Sudder Ameen, although there was not that ground of appeal, did expressly decide the case upon that point, as well as upon others. Sitting here upon appeal from the decision of the Principal Sudder Ameen, and for the purpose of doing justice, we must deal with this case as if the Principal Sudder Ameen had allowed the grounds of appeal before him to be amended, and an additional ground of appeal inserted; namely, that the Sudder Ameen was wrong in admitting the review after the expiration of ninety days without sufficient cause, and then his judgment would have been founded upon that ground of appeal. Therefore I think this case properly comes before us, although there was no special ground of appeal to the Principal Sudder Ameen that the decision of the Sudder Ameen was wrong in admitting the review.

Then come the questions,—*first*, was there just and reasonable cause for not having preferred the application within the limited period? *secondly*, can this Court look to the reasonableness or sufficiency of the cause, or is that question left wholly and entirely to, the discretion of the Court to which the application for review is made? Now it appears to me that it would be very dangerous to leave the just and reasonableness of the excuse for the delay to the discretion of the Lower Courts. It is a ground of the greatest importance that decisions which have been passed for many years should not be opened unless some sufficient ground be shown for the delay in not having applied earlier. In a case before the Privy Council, reported in the VII Volume of Moore's Indian Appeals, page 283, Moharajah Moheshur Singh *vs* The Bengal Government, one of the points was whether the Commissioners of Revenue were right in admitting a review of a decision in a resumption suit after the expiration of ninety days without sufficient cause. The Lords of the Judicial Committee treated the admission of a review after the expiration of three months, which was the time allowed by the Regulation XXVI of 1864, as an interlocutory order. At page 302 they say:—"Before we enter into the particulars of that question, we deem it right to notice an objection which was taken at the bar, on the part of the respondents, that it was too late now to impugn the regularity of the

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proceeding to grant the review; that if the appellant deemed himself aggrieved by it, he ought to have appealed at the time; and that he was too late in doing so after a decision had been pronounced against him. We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may consider himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court."

The Judicial Committee thought that the appellant was in time, after the decree had been passed on the review, to take objection that the Court was wrong in admitting the review after the expiration of three months without reasonable cause. The words of Regulation XXVI of 1814, so far as the admission of the review after the expiration of the time limited is concerned, are almost identical with those of Section 377 of the present Civil Procedure Code. The second Clause directs that the petition for review shall be presented within three calendar months. This provision, however, admits of an exception by providing that if the parties preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period, such review will be allowed. The Privy Council did not think that the words "to the satisfaction of the Court" would prevent them from looking into the grounds which were argued as an excuse for the delay. The Lords of the Judicial Committee say:—"It necessarily follows that if the review was granted without due regard to the regulations governing such proceedings, it, and all that has been done under it, must fall to the ground." That is at page 309. It appears to me that that case is similar to the present, and that the words to which our attention had been called in Section 378, *viz.*, "its order in either case, whether for rejecting the application or granting the review, shall be final," are applicable only to the order for rejecting the application or granting the review, and not to the decision as to whether there was just and reasonable cause for allowing the application to be made after the period of ninety days mentioned in Section 377.

Now let us see what would be the consequence of holding that the new decision, or the new exposition of the law by the Full Bench, was a sufficient excuse for not having applied for the review of judgment within the period of ninety days. If it was a sufficient excuse for not having applied within the period of ninety days, it would be a sufficient excuse for applying to review every judgment which has been given in resumption suits within the last fifty years, and consequently almost all the titles which depend upon decrees in resumption suits would be altogether upset; because, if we hold that there was sufficient ground to apply for a review of this judgment in consequence of that decision, we must also hold that there would be sufficient ground for applying for the review of every judgment of the same character which has been passed within the last fifty years. No title therefore would be safe which depends upon a decree in a resumption suit. The Judicial Committee of the Privy Council say upon that point:—"Let us now address our attention to the Regulations which have been passed relative to the question of granting a review. It must be borne in mind that a review is perfectly distinct from an appeal; it is quite clear from the Regulations that the primary intention of granting a review was a consideration of the same subject by the same Judge, as contra-distinguished to an appeal, which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and different Judge, because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex necessitate.*"

In this case there was the exception; for the Sudder Ameen who had

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passed the decision had left the station, and a new Sudder Ameen had been put in his place.

The Judicial Committee go on to say :—" We do say that in all practicable cases the same Judge ought to review, and that, for the attainment of that object, expedition in presenting a petition for the review is indispensable, and the only practicable course for attaining that end by accelerating the hearing of the review before accident, or unexpected events shall have removed the original Judge Looking to all these circumstances, we should naturally expect to meet in the Regulations upon this subject such provisions as would prevent the events necessarily incidental to delay and procrastination." (See page 304.)

In another part of their judgment, they say (page 308) :—" We are of opinion that for granting a review in the cases we have just supposed to exist, the causes accounting for the delay, and intended to justify the grant of a review, ought to be of grave importance."

At page 303 they say :—" Before considering whether the review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made were entitled after the lapse of a sufficient period, no appeal having been asserted, or petition for review presented, to conclude that the Government acquiesced in what had been done by the Special Commissioners, and, in that rational conviction, to deal with the property upon the footing of the past decision."

Now it appears to me that all the principles to be deduced from the case to which I have referred are equally applicable to the present case, and that a new exposition of the law was not a just and reasonable cause for not having presented the review within the ninety days required by law. The new construction of the law might be a ground for review, but it was no excuse for not having applied before. If it was, cases which have been decided and acted upon for fifty years might be re-opened, which never could have been intended.

I think the review in this case ought not to have been admitted, and that we must follow the course which the Privy Council did in the case to which I have alluded, and hold that if the review was granted without due regard to the provisions of Section 377, it, and all that has been done under it, must fall to the ground.

I am of opinion that there was no just and sufficient cause for not having preferred the application for a review within the limited period, and that the hearing of the review by the Sudder Ameen after the lapse of the period limited, did not preclude a Court of Appeal from enquiring whether the excuse for the delay was sufficient.

There was a case in this Court in which Mr. Justice Shumboonauth Pundit and Mr. Justice Glover differed in opinion as to whether a decision which had been passed upon a rehearing under a review (the review having been granted after the expiration of ninety days, and the Judge having given no reason for the admission of the review), could be interfered with by this Court. Mr Justice Shumboonauth Pundit thought that, under Sections 377 and 378, the decision of the Court admitting the review was final, although he gave no reasons for admitting it after the expiration of the ninety days On the other hand, Mr. Justice Glover thought that an appeal would lie from the decision which took place on the hearing on review, and that the question whether there was reasonable cause for the delay or not might be enquired into by this Court. The case was referred to a third Judge, and came before me, and I concurred with Mr Justice Glover that the fact of the Judges having admitted the review after the ninety days was not conclusive upon this Court that there was sufficient excuse for the delay.

I thought that the Principal Sudder Ameen was not authorized to enter

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into the ground for granting the review, until he was satisfied that there was reasonable cause for the delay If the Sudder Ameen had the power to admit a review in this case, his successor might review his judgment twenty years hence, and any Principal Sudder Ameen would have power to review a decision passed by his predecessor twenty years ago, without any cause for the delay in making the application being shown, and without pleading himself that the cause, if any, assigned for the delay is, in his judgment, sufficient. If such were the case, there would be an end to all finality in litigation.

I am of opinion that an application for a review cannot be properly admitted after the limited period unless there is just and reasonable cause for the delay, and that a decision as to what is just and reasonable cause for admitting an application for review after the prescribed period of ninety days is one upon which an appeal will lie

As to the second ground, I have already stated that, in my opinion, when a review is properly granted, the case, upon the rehearing under the review, ought to be decided according to the last exposition of the law by a Full Bench.

As nothing remains to be done by the full Bench, I may state that my opinion now is that this appeal, which has been preferred against the decision of the Principal Sudder Ameen, must be dismissed, upon the ground that the Principal Sudder Ameen was right in holding that there was no sufficient cause for admitting the review after the expiration of the ninety days.

The appeal is accordingly dismissed with costs.

Glover, J.—I concur generally in the judgment of the learned Chief Justice. It appears to me, on further consideration, that Sections 377 and 378 of the Civil Procedure Code refer to different things, and ought not to be read together, and that an order passed under the first-named Section is an interlocutory order, which is subject to appeal. (Moheshur Sing *vs* Government of Bengal, 7 Moore, 362.)

And if this be so, the Principal Sudder Ameen's finding on the question as to whether there was just and reasonable cause for receiving the application for review after the ninety days had elapsed, was a question of fact with which there would be no interference possible in special appeal.

It does not seem to me necessary to go further than to declare that the first Court's decision as to what is "just and reasonable cause" is open to appeal. This was the question referred to the Full Bench.

And I do not think that, under the circumstances of this case, we are called upon to say whether the Principal Sudder Ameen's opinion as to the sufficiency or otherwise of the Moonsiff's reasons was a good one or not.

As the second point referred has been given in favor of the opinion expressed in the referring order, I have only to say that on this point I concur with the learned Chief Justice.

Macpherson, J —I think that Sections 377 and 378 of Act VIII of 1859 must be read separately The words in Section 378, which declare that "the order, whether for rejecting the application or granting the review, shall be final," must be read as applying solely to the application under Section 378, and not to the application under Section 377, which last Section relates only to the question of the time at which the Court is first asked to review its judgment

I concur in the order dismissing the appeal.

Jackson, J —I entirely concur with the Chief Justice upon the two questions referred by the learned Judges of the Division Court.

The second of these questions is extremely simple; and, for the reasons stated by the Chief Justice, I am of opinion that when the review had been once admitted by the Sudder Ameen, and the sufficiency of the cause for which he admitted the review is not a matter for the consideration of any Appellate Court, then, undoubtedly, he would be right in deciding

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the case that was again before him for decision according to the exposition of law then governing the Courts.

The first question is one of somewhat more difficulty. Applications for review presented to the Court after the expiration of ninety days stand upon wholly different grounds from applications presented within the ninety days. When presented within ninety days, they are presented as a right, and the Court has then to apply itself only to the reasons which the petition contains for review of judgment; but when ninety days have expired, quite an independent question presents itself in the first place for the decision of the Court, namely, whether the parties have shown a just and sufficient cause, to the satisfaction of the Court, for the delay which has taken place. It appears to me that the decision of the Court upon that point stands quite apart from the decision under Section 378, and that it is a matter which is one for the consideration of an Appellate Court, if an appeal should be afterwards made from the decree. It seems to me that an order made upon that case comes clearly within the terms of Section 363 as an interlocutory order. It was so regarded by the Privy Council in the case to which my lord has referred, and is therefore clearly one to which objection may be taken on appeal against the final decree.

Then it is said that no ground of appeal upon this point was presented to the Principal Sudder Ameen. It appears to me that this is wholly immaterial, not only for the reasons given by the Chief Justice, but also because, by Section 334, it is provided "the appellant shall not, without the leave of the Court, urge or be heard in support of any other ground of objection; but the Court, in deciding the appeal, shall not be confined to the grounds set forth by the appellant" It is therefore entirely within the competency of the Court to take into its consideration anything in the case which either affects the regularity of the proceedings of the Court below, or relates to the correctness of the decision upon the merits. It appears to me therefore that the Principal Sudder Ameen was entirely competent to take up this point and to dispose of it on the appeal.

I am of opinion that if the Sudder Ameen had entertained this petition of review presented after the expiration of ninety days, without stating that any just or sufficient cause had been shown, to his satisfaction, for the delay, I think that then the order would have been absolutely bad, and all that would have been done under it would fall to the ground.

I also think that if good and sufficient reason had been shown, and that reason had been such as the Appellate Court could not approve, the Appellate Court would be justified in setting it aside. I further think that the reason assigned in this case, namely, the promulgation of a new interpretation of the law, was not a good and sufficient cause for admitting or entertaining the application for review after the lapse of ninety days.

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CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

Not discreet for a Collector to make over for trial to himself as Magistrate a charge of an offence against himself sitting as a Revenue Court.

Revision by the High Court of proceedings under Sections 404 and 405 of the Code of Criminal Procedure in the case of Nehal Mahatan.

Before *Kemp* and *E. Jackson*, J. J.

We think that, as a general rule, it is very objectionable for the same officer who entertains a charge, under Section 168 of the Criminal Code Procedure, of an offence against any Court or public servant, to make over such case for trial to himself as Magistrate. There may be cases in which such a course of procedure could not be avoided. We have not been shown that, in this instance, there was not "any Magistrate" having power to try the case under Section 171.

We also think it was very objectionable in the Magistrate, in his capacity of Collector, giving his evidence as a witness before himself as Magistrate. There might be exceptional cases in which such a procedure would be necessary; but they must be of very rare occurrence.

We think that there was nothing illegal in the proceedings of the Magistrate, though we are clearly of opinion that he did not act discreetly.

The prisoner we hold to have been acquitted by the Judge, and we therefore cannot interfere further in the case.

CIRCULAR ORDER No. 1.

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HIGH COURT CIRCULARS AND LETTERS.

HIGH COURT, &c., CRIMINAL SIDE.
Before, *Peacock*, C. J., and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J. J.
Summons on medical subordinates cited as witnesses to be served through the Magistrate of the District.

To

THE MAGISTERIAL AUTHORITIES IN THE LOWER PROVINCES.

Dated Calcutta, 10*th January*, 1868.

Considerable inconvenience having been experienced in consequence of Sub-Assistant Surgeons or Native Doctors at Sub-Divisions being summoned from their stations without the knowledge of the Civil Surgeon of the District, to whom they are subordinate, for the purpose of giving evidence in cases in which they have held *post-mortem* examinations, or when their attendance may be otherwise required by the Judicial Authorities, the High Court are pleased to direct that in future all summonses on these Medical Subordinates be served through the Magistrate or other Executive Head of the District to enable him, in communication with the Civil Surgeon, to make arrangements for the conduct of their medical duties during their absence.

PART V.

SMALL CAUSE COURT AND OTHER REFERENCES.

Reference from the Additional Principal Sudder Ameen of Dacca.

Rashmonee Goshamee, *Appellant*, *versus* Isan Chunder Mookerjee and others, *Respondents*.

Before *Peacock*, C. J., and *Hobhouse*, J.

A vakalutnama containing a stipulation as to fees could be registered under Regulation XX of 1812. A suit on an unregistered document of the kind must have been brought within three years.

Case.—A vakeel sued for the fees which, in the vakalutnama, his client agreed to pay The question was whether limitation barred the suit. Clauses 9 and 10 of Act XIV of 1859 fix three years as the time within which to bring a suit on an unwritten or unregistered contract. The vakalutnama was unregistered, but the Lower Court, being of opinion that there was no law under which such a document could have been registered, thought the three years' limit did not apply, and referred the case to the High Court.

Judgment of the High Court.—We are of opinion that the suit was barred by limitation as regards the fees in all the three cases. In the vakalutnama of the 25th of Bysack, 1270, the defendants agreed to pay the fees according to law. That was an obligation for the payment of money, and might have been registered under Section 5, Regulation XX of 1812. Consequently three years was the period of limitation. The two other vakalutnamas contained no contract on the part of the defendants to pay the fees, and consequently there was no written engagement to pay them. The suit, as regards the fees due for business done under those vakalutnamas, comes under the rule laid down in Clause 9, Section 1 of Act XIV of 1859, and the period of limitation is also three years.

Reference from the Judge of the Small Cause Court at Midnapore.

14th January.

Woodoy Chand Jana, *Plaintiff*, *versus* Nitye Mundul and Poresh Mundul, *Defendants*.

Before *Peacock*, C. J., and *Hobhouse*, J.

A bond pledging land as collateral security for a debt is not a document the registration of which is under law compulsory.

Case.—Plaintiff sues to recover the principal and interest, amounting to Rupees 300, due on a bond for Rupees 252, in which bond the obligors, after reciting the particulars of, and the necessity for, the loan, and stipulating the period for re-payment, have pledged certain rent-paying lands as security for payment in the following terms:—

"As a security for the liquidation of this loan, we pledge our ancestral holding of 43 beegahs 18 cottahs of land in the village of Chundeepore, in Pergunnah Midnapore. Should we fail to make good our debt, you (obligee) shall be at liberty to sue for and recover your money by the sale of the said lands and of other moveable and immoveable property belonging to us No objection shall be preferred to such sale or recovery by ourselves, heirs, or representatives, nor shall we in any wise alienate or transfer the said lands until we repay your money. Such alienation, if made by us, will be null and void, to which effect we execute this bond," &c.

The bond has not been registered, and therefore the pleader for the

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defendants contends that it cannot be received in evidence under Section 49, Act XX of 1866, on the ground that it is one of the documents the registration of which is compulsory under Section 17 of that Act.

The question on which I solicit the decision of the Hon'ble Court is whether the bond in dispute is one of the instruments defined in Clause 2, Section 17 of the Registration Act; and whether or not it can be received in evidence in plaintiff's suit for money, in which a simple money-decree, such as will not affect the immoveable property mentioned in the deed, is sought or applied for.

I am of opinion that the land is pledged as a mere collateral security, and that the bond is, to all other intents and purposes, a simple bond for money lent, the registration of which is optional under Clause 7, Section 18 of the Act quoted above. Section 49 of the same evidently refers to those instruments which affect immoveable property, and provides that the property comprised in such instruments will not be affected by them if they are not registered But as no immoveable property will be affected by the personal or money-decree sought by the plaintiff, who has relinquished whatever lien was bestowed on him on the property pledged by the bond, I think that this bond can be admitted in evidence for the purposes of the present suit.

Judgment of the High Court.—We are of opinion that the view taken by the Judge of the Small Cause Court is correct.

15th January.

Reference from the Officiating Judge of Moorshedabad.

Mohamund Haldar, (Defendant) *Appellant, versus* Akial Mehaldar, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Hobhouse*, J.

Sale in execution of a decree against B of moveable property belonging to A, may be set entirely aside at the suit of A. The Court may restore the property to A or award him damages at its discretion, his prayer being for one of these alternatives.

The points submitted are—*First*—If moveable property proved to belong to A be sold in execution of a decree against B, can the sale be set aside on the suit of A?

Second.—If such a sale can be set aside, and the prayer of A is that the moveable property so sold be restored to him or its value, if it is possible to restore the property, is not the Court bound to do so?

Judgment of the High Court—The plaintiff sued to recover a boat which belonged to him, and which had been seized in execution and sold under decree He made an alternative claim, either to the boat or to the value thereof in damages. The question which is submitted for our opinion by the Judge, under Section 28, Act XXIII of 1861, is whether the plaintiff, assuming that the boat is proved to be his, is entitled to recover either the boat or the value of it in damages. The boat was sold under Section 249, Act VIII of 1859 But under that Section only the rights and interests of the judgment-debtor were sold. By Section 251 of the same Act, it was enacted that, on payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute. But as the sale was only of the rights and interests of the debtor, when the sale became absolute, it transferred only the rights and interests of the debtor. By Section 252 it is enacted that no irregularity in a sale of moveable property under an execution shall vitiate the sale; but any person who may sustain any injury by reason of such irregularity, may recover damages by a suit in Court.

We are of opinion that the sale of the moveable property belonging to one man under an execution of a decree against another, is not a mere irregularity within the meaning of that Section. In this respect we take the same view as the Judge who referred the case.

The Moonsiff, from whom the appeal went to the Judge, treated the sale of the plaintiff's boat as an irregularity, and held that, as it did not vitiate the sale under Section 252, the plaintiff could not recover the boat, but could

only recover the value of it in damages. But we think that Section 252 had no applicability whatever to the case.

The Judge seems to think that, as the plaintiff made an alternative claim to the boat or to the value of it in damages, the Moonsiff was bound to give him a decree for the boat. But the plaintiff was entitled to sue either for the restoration of the boat specifically, or for damages; and notwithstanding it is found by the Judge that the boat is in existence and in constant use by the defendant, we are of opinion that, as the plaintiff asked either for the boat or for damages, it was in the option of the Court to award him either according to its own view of the justice of the case.

Under these circumstances, we are of opinion that the Judge, on appeal, may, if he thinks fit, award to the plaintiff the boat specifically, or, if the damages assigned by the Moonsiff are reasonable, he can let the decree stand for the damages, or he may alter the amount to such a sum as he may consider to be reasonable.

If the Judge awards the boat specifically, he will probably think it right to award alternative damages under Section 200, in case the boat be not restored.

Reference to the High Court from the Judge of the Small Cause Court at Kishnaghur.

18th January

Joykalee Dassee *versus* the Representative of Chandmallah.

Before *Peacock*, C. J., and *Hobhouse*, J.

Held, that defendant was not liable to damages, who in good faith attaches a decree obtained by his judgment-debtor in ignorance of its having been transferred to a third party.

Case.—Plaintiff sues for damages comprising the amount of a decree with interest which she had purchased from one Ameer Biswas, and which, owing to an unlawful attachment by defendant, she was unable to execute.

As the circumstances of the case are unusual, and I have been unable to find any precedents strictly in point, I have thought it my duty to make a reference to the High Court on the following points:—

First.—Is the injury sustained by plaintiff actionable?

Second.—What limitation applies?

The facts are as follows:—

Ameer Biswas got a decree, under Act X of 1859, against Mr. J. White, on the 26th June, 1865, and sold it to the plaintiff on the 26th idem. Defendant, who held a decree against Ameer Biswas, which he was executing in the Principal Sudder Ameen's Court, petitioned that officer, on the 30th June, that the right of Ameer Biswas in the Act X decree might be attached, and Mr. White ordered not to pay the money to Ameer Biswas, but to lodge it in Court. The Principal Sudder Ameen took the evidence of defendant's gomasta, to the effect that Ameer Biswas was endeavouring to dispose of the decree; and observing "that the prayer of the applicant (defendant) was only that the decree might not be allowed to be transferred," and professing to act under Section 92 of Act VIII of 1859, sent a proceeding to the Collector forbidding the transfer. The date of this order was the 7th July. He also issued an ittalanamah to Mr. White, directing him not to pay the amount of the decree to Ameer Biswas. The Collector accordingly passed an order on the 5th August that the purchaser (plaintiff) should not be allowed to execute the decree.

On the 18th August the Principal Sudder Ameen declared the decree which defendant was executing against Ameer Biswas barred by limitation, and released from attachment the Act X decree which had formed the subject of the injunction under Section 92.

Meantime plaintiff had applied to the Collector for execution against Mr. White on the 1st July. No order was passed on the application till the 9th September, when the Collector, observing that the attachment of the decree by the Principal Sudder Ameen had been rescinded by that officer's decision of the 18th August above quoted, directed execution to be proceeded with.

On the 21st September defendant appealed to the Judge against the decision of the Principal Sudder Ameen, who had declared defendant's decree

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against Ameer Biswas barred by limitation. In this petition of appeal, defendant prayed that the Act X decree which the Principal Sudder Ameen had released from attachment might be again attached. The Judge, in compliance with the request, sent a proceeding to the Collector, dated 21st September, to re-attach the decree, which the Collector did on the following day.

Plaintiff again applied to the Collector for execution against Mr. White, which was refused on the 29th November, on the ground of attachment by order of Court.

Plaintiff next petitioned the Judge on the 29th March, 1866, begging that the attachment of her purchased Act X decree be withdrawn, and that she be allowed to execute it against Mr. White, whose property, she alleged, was being transferred and made away with, and stating that she (plaintiff), through delay in executing the decree, was running the risk of losing her money altogether. This petition was not complied with by the Judge, who, however, upheld, on appeal, the Principal Sudder Ameen's order (declaring the decree of defendant against Ameer Biswas barred by limitation) on the 5th October, 1866, and this order was finally confirmed by the High Court on the 20th February, 1867, but the Act X decree remained under attachment all that time; and as Mr. White had become insolvent in April, 1866, plaintiff lost all benefit from the decree.

Defendant pleads that he is not responsible for any loss accruing to the decree while under attachment. In the case of Raj Bullub Gope *vs.* Isar Chunder Hajrah, III. Wyman's Reporter, 238, it was held that the defendant was not liable to damages in respect of an attachment made under a warrant issued by the Court. In that case, however, the plaintiff seems to have acted illegally, inasmuch as he claimed the property in dispute as his own exclusively, while he was really entitled only to a half share; and in the case of Inder Chand Dogare *vs.* Nunderam Singh, quoted at page 162 of Broughton's Civil Procedure, and 27 of Thomson on Limitation, it was held that damages could be recovered on account of the wrongful taking in execution of property which had deteriorated in value while under seizure.

I think that, as defendant has not shown any want of good faith in the transfer of the decree by Ameer Biswas to plaintiff, his (defendant's) attachment of it after that transfer was wrongful *ab initio*, and that he is responsible for the injury resulting to plaintiff in consequence.

Finally, as to the question of limitation, the decree must be regarded as personal property, and defendant therefore contends that one year is the period of limitation applicable. If he is right, plaintiff is out of Court, as he cannot possibly date his cause of action later than White's insolvency (April, 1866), and the plaint was not filed till more than a year afterwards. I think, however, that Clause 16, Section 1 of the Limitation Act more properly applies. It was so held in Inder Chand Dogare's case quoted above, where it was laid down that wrongful seizure of goods, under process of law, was not an injury to personal property within the meaning of Clause 2 of Section 1.

Judgment of the High Court.—It appears to us that the defendants are not liable to damages, and that the suit cannot be maintained against them as the representatives of Chand Mala.

It appears from the statement which is submitted for our opinion that the defendants who held a decree against Ameer Biswas applied, on the 30th of June, 1865, to attach a debt which Ameer Biswas had obtained against Mr. White, the decree which Biswas had so obtained having been sold to the plaintiff previously to that application. The application appears to have been made under Section 92 of Act VIII of 1859, instead of under Section 236.

The Principal Sudder Ameen ordered an injunction to restrain Biswas from selling his decree, and he also ordered Mr. White not to pay Biswas.

On the 18th of August the Principal Sudder Ameen held that the defendants were barred by limitation from executing their decree against Ameer Biswas, and released the decree from attachment. On the 21st of September, the defendants appealed to the Judge against the order of the

Principal Sudder Ameen, which declared the right of execution to be barred by limitation; and in their appeal they asked that the decree which had been released from attachment should be again attached; and the Judge, in compliance with the request, sent an order to the Collector on the 21st of September ordering him to re-attach the decree.

There seems to have been considerable confusion in dealing with the case, both by the Judge and the Principal Sudder Ameen. The Principal Sudder Ameen appears to have acted partly under Section 92, and partly under Section 236 of Act VIII; whereas the proper course was to proceed under Section 236, and to attach, at the suit of the defendants, the debt due from White to Biswas.

But the Judge seems to have sent the case to the Collector to attach the decree. If the decree had been properly attached by the Civil Court, the plaintiff ought to have made an application to the Civil Court to release the decree from attachment, upon the ground that the debt did not belong to Biswas, inasmuch as he had sold it to the present plaintiff. But the plaintiff does not appear to have petitioned the Judge until the 29th of March, 1866, when she petitioned that the attachment of the Act X decree, which belonged to her under her purchase, might be withdrawn, and that she might be allowed to execute it against Mr. White; and she then brought to the Judge's notice the risk which she was running from the delay in executing the Act X decree which she had purchased. But the Judge refused to comply with her petition, and to rescind the order which he had made on the 21st of September, 1865.

Whether the injunction was issued under Section 92 or under Section 236, the Judge might have applied a remedy to prevent the risk of the debt being lost through the insolvency of Mr. White; for if the application was properly made under Section 92, the Judge might have appointed a receiver of the debt due by Mr. White to Biswas; or if the application was made under Section 236, the Judge might have appointed a manager.

It does not appear that, up to the 29th of March, 1866, the plaintiff ever made it known, either to the Principal Sudder Ameen or to the Judge, or even to the present defendants, that she had purchased from Biswas the decree against Mr. White, and therefore the present defendants were perfectly justified in treating the decree which Biswas had obtained from Mr. White as the property of Biswas, and not as the property of the present plaintiff.

Besides, all that was done by the defendants was done by application to a Court of competent jurisdiction, and under an order of such Court.

The Judge, when he made the order, was as well aware as the present defendants that the Principal Sudder Ameen had held the right of execution barred by limitation; but he thought it right, pending the appeal to himself from the decision of the Principal Sudder Ameen, to order that the decree should remain under attachment against Biswas.

It was held in this Court, in the case cited by the Judge of the Small Cause Court from III. Wyman's Reporter, page 238, that a defendant was not liable to damages in respect of an attachment made under a warrant of execution issued in pursuance of Section 233, Act VIII of 1859.

In this case the order of the Judge was to attach the decree as the property of Biswas; and it appears to me that the defendants were not responsible for that which was done under the Judge's order.

It is not necessary to decide whether, if a judgment-creditor applies for a general attachment of all the defendant's property under Section 214, and obtains a general warrant of seizure, and causes the Nazir, under that general warrant, to seize property of a third person as property which belongs to the defendant, he may not be liable to that third person. But by Section 218 of Act VIII of 1859, whenever a general warrant is granted, the Judge may require the applicant to give security against any injury which may be occasioned by seizure of property which does not belong to the judgment-debtor.

It does not appear whether the seizure in the case cited from Coryton's reports was under a general warrant, or under a warrant for the seizure of the

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specific property. The case had reference merely to the question as to the time from which limitation ran in a suit for injury done to such property during seizure, and not to the question whether the defendant was liable or not.

If a plaintiff brings a suit, or makes an application maliciously, or without probable or reasonable cause, to a Court of competent jurisdiction to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient; but in this case the defendant was not acting maliciously or without probable cause, but merely applied for the attachment of a decree which had been obtained by his own judgment-debtor, when there was nothing to show that that decree had been sold to the plaintiff.

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Reference from the Judge of the Small Cause Court at Pubna.

Peary Lall Shaha, *Plaintiff*, *versus* Woomesh Chunder Mozoomdar and others, *Defendants.*

Before *Peacock*, C. J., and *Hobhouse*, J.

An acknowledgment of a deceased relative's debt, and a promise to pay it, is binding, even though no consideration have passed to the promiser.

Judgment of the High Court.—The defendant's brother borrowed Rs. 300 from the plaintiff, and gave a note of hand for it, dated 25th July, 1864; and it does not appear that any other debt was owing to the plaintiff. After the death of the brother, the defendant, in answer to an application which the plaintiff made to him for payment, wrote the letter now submitted to us, saying:—"I am told you are a little anxious for the debt due to you by my brother. You need not be in any anxiety for the recovery of the same, as we shall repay you."

It appears to me to be clear that the defendant included himself at any rate under the word "we," and that he did not by that word refer to his brother's widow.

He then says:—"It is a matter of great difficulty to repay this money at the present moment in one lump sum, and I therefore desire to make payment of the same by instalments. If the said occurrence had not happened, there was no necessity for me to write for an instalment."

Taking the whole letter together, we think it is an acknowledgment that the defendant was liable to the plaintiff for the debt which the brother had contracted, and asking for time for payment, excusing himself for making that request by the distress which his brother's death had caused to the family.

In this view of the case, the plaintiff was not legally bound to give time for payment by instalments; but he did, in fact, wait payment for six months.

It is therefore unnecessary for us to decide whether, in a Court which is to be guided by the rules of equity, justice, and good conscience, a man who promises to do a thing is not bound to perform that promise unless there is a consideration for it.

The case* which has been referred to by the Judge of the Small Cause Court as an authority that a promise to pay a debt is not binding unless it specifies the amount, does not bear out the Judge as to the principle for which he cites it; and there must be many cases in which a promise to pay a debt would be binding, though the amount of it has not been ascertained at the time. In the case cited, the only question was whether a writing which the defendant had given was a sufficient acknowledgment by him in writing of a debt due by him to take the case out of the Statute of Limitation under Section 4 of Act XIV of 1859.

The case should be returned to the Small Cause Court, with an opinion that the defendant is liable under his letter to pay the debt.

Wyman's Reporter, Vol. I., Part V., page 15, N. C. Mozoomdar v. T. J. Kenny.

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SMALL CAUSE COURT AND OTHER REFERENCES

Question of the personal liability of an agent in an action of contract Suits in the Small Cause Court will lie only upon a true contract, express or implied, not upon a *quasi* contract where there is no convention.

Amendment of plaint in Small Cause Court suits.

Reference to the High Court from the Judge of the Small Cause Court at Kishnaghur.

Mohendronath Mookhopadhya, Overseer, *Defendant.*

Before *Peacock*, C. J., and *Bayley*, J.

Case.—This is an application by the plaintiff for a new trial. Whether the rule shall be discharged or made absolute must depend upon the opinion of the High Court on the points hereinafter submitted for decision

The facts are as follows:—The plaintiff sued one "Mohendronath Mookhopadhya, overseer of, or for, the Municipal Office," (see in plaints) for the recovery of Rupees 215-9-4 due on a contract, dated the 5th Cheit, 1273, under which plaintiff had done a quantity of earth-work at Rupees 4 per 1,000 cubic feet. At the trial, the contract appeared to be a verbal one; at least neither plaintiff nor defendant made any allusion to a writing. On the motion for a new trial, it appeared that there was a written agreement, and this agreement has been now produced by the defendant under a summons pursuant to the provisions of Sections 40, 153, Act VIII of 1859. This document was unstamped, but the plaintiff, who required its production, paid the necessary penalty in order to render it admissible in evidence. (Section 130) This contract professed to be made between the plaintiff and Mohendronath Mookhopadhya, "overseer" The plaintiff in his deposition admitted that he knew Mohendronath to be the paid servant of the Municipality; that he was well aware that the work done by him was work for the Municipality; that he believed he was to be paid out of Municipal Funds; that Mohendronath was not a ticcadar or person engaging with the Municipality to do the work by the job or by contract, who might thus let it out by sub-contract to a sub-ticcadar or sub-contractor. Having regard to these admissions, and to the defendant being named as "overseer" on the face of the contract, I found as a fact that the defendant (as he himself deposed on solemn affirmation) had contracted as an agent, and not as a principal; and that at the time the contract was made, the intention of the parties was that the Municipality should be liable. (*See* Broom's Common Law, pages 532 and 541, last edition, and Smith's leading cases, Vol II, page 326.) There was no evidence to show that the defendant had pledged his personal credit. All the circumstances of the case contradicted the supposition, and whether with or without authority, he clearly contracted for the Municipality, and for the performance of work well known by the plaintiff to be Municipal work.

Such being my finding of fact, the first question I have to propose for the decision of the High Court is as follows:—"Can the defendant Mohendronath Mookhopadhya be made personally liable in the present action, being an action brought on a contract?" If the case were to be decided in accordance with the principles of English law, I think that the question must be answered in the negative. "It would seem," says Mr Lush, referring to the case of Downman *vs* Williams, 7, Q B. 103, "that if the agreement imports to be made by the principal, and is such that it cannot be construed as the personal contract of the agent, the agent cannot be sued thereupon, though he signs it without authority, and his want of authority is unknown to the party with whom he treats. The only remedy against him is an action for the fraudulent misrepresentation" (Stephen's Lush's Common Law Practice, 2nd edition, page 63.) Now, in the present case, the defendent is called "overseer" on the face of the contract; and even if the word "overseer" be held to be merely descriptive, it would yet, looking to plaintiff's knowledge of the facts, be impossible to construe the agreement as the personal agreement of the defendant.

The question how far and when an agent can be made liable in an action of contract is discussed in the following authorities:—Chitty on Contracts, 7th edition, pages 207-210; Smith's Mercantile Law, pages 163, &c; Broom's Common Law, 3rd edition, page 542; Stephen's Lush's Common Law Practice, page 55; Smith's Leading Cases, 5th edition, Vol. II, pages 322, 327, 328, 337,

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338 If I might venture to condense these authorities, the cases might resolve themselves into the following:—

First.—Where an agent contracts personally or pledges his own credit.

Second.—Where the agent makes a fraudulent representation of his authority with intent to deceive.

Third.—Where he has no authority, and knows it, but, nevertheless, makes the contract as having such authority.

Fourth.—Where having, in fact, no authority, he *bonâ fide* believes he has such authority.

Now, my finding on the facts excludes the application of the first case. In cases second, third, and fourth, Mr. Smith shows that the agent cannot be sued on the contract unless it be shown that he is himself the principal, which is not the case in the present instance. "An action, however, on an implied contract," says he, Vol II., page 328, "for the existence of the authority each professed to have would appear to include all three classes" See to the same effect Chitty on Contracts, page 210, and the cases cited in the note. (*Per Jervis, C. J., &c*)

In the present case it was sought to show, on the motion for a new trial, that defendant had made a contract which the Municipality ignored, and, as I take it, that therefore he was liable under some one of the latter three cases put above. It is clear that if the present action is to go on in its present shape after my finding already mentioned, the defendant must be made liable on an "implied contract." Now, I think that, looking to the meaning of an "implied contract," as defined in the late important decision on a reference from this Court in the case noted in the margin, it cannot be said that the implied contract in the present instance is anything but a *quasi* contract. There was no convention, and the liability is a liability created by law or natural equity, according to which it is just that an agent, falsely or carelessly holding forth an authority which he did not possess, should be liable for the consequences of his fraud or carelessness. "The word 'contract' used in Section 6 of the Small Cause Court Act," said the Chief Justice in the above decision, "refers to true contracts, whether express or implied." The implied contract in the present case is not such a true contract, but is a *quasi* contract, and I am of opinion that the defendant cannot be made liable in the present action of contract.

Rambux Chitlangee and others *vs.* Mudhoosoodun Paul Chowdry and others, VII Weekly Reporter, Civil Rulings, page 583.

If the High Court support my finding on the above point, the next question I have to submit is "Can the plaint be amended, so as to make the defendant liable, in tort, for a misrepresentation of his authority?" That the defendant (supposing the facts proved) would be liable in this form, there is no doubt; (*see* Broom's Common Law, page 540; Smith's Leading Cases, Vol. II, page 312; Roscoe's Nisi Prius, page 507; and Addison on Torts, pages 751, 770, 771); and this would, I think, be an action for damages triable in this Court.

The tendency of modern legislation has been to enable Courts to amend the record, so as to try the substantial question at issue between the parties in every instance where such an amendment is consistent with the claim put forth, or the remedy sought. The Small Cause Court Act contains no special provisions on the subject of amendment, but there can be little doubt that the procedure of these Courts should conform to the spirit of the provisions contained in the Code of Civil Procedure. Before that Code became law, it was laid down as follows by the Privy Council in the case* of Honuman Persad Pandee *vs.* Mussamut Bahavee Manraj Koonwari:—"It is of the utmost importance to the right administration of justice in these Court that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance,

* Moore's Privy Council Appeals, Vol. VI, page 11.

and not the mere literal wording of the issues, is to be regarded; and that if by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute."

In a recent decision of the High Court, noted in the margin, the subject of amendment, under the provisions of the Code of Civil Procedure, underwent considerable discussion. The following passage occurs in the reported decisions:—"The Judge, on the representation of the plaintiff, cannot alter the nature of the suit, or change the cause of action. This power of amendment extends by means of a *vivâ voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what was erroneous and the supplying what was defective, but not to the conversion of a suit of one character into another inconsistent with, and that may be opposed to it, and the issues, we apprehend, must be founded on the claim as brought in the plaint, and not on something else which plaintiff at some subsequent period may prefer to consider as his cause of action, but which is altogether at variance with the relief prayed for in the plaint" There are no regular issues framed in Small Cause Court cases, but the points for decision are similar to issues, though not regularly recorded as such, and the spirit of the above decision should, I think, apply. The plaintiff (though the plaint was in some measure obscure) sued for money due under the contract by the defendant as the obligor of that contract. Nothing is said about the defendant having contracted as an agent beyond the scope of his authority, or without any authority at all, and therefore being liable for misrepresentation. It is clear that the plaintiff mistook his proper ground of relief, and that he only became aware of such proper ground after the case had received considerable discussion in Court, and had been at first dismissed, because he sought to make personally liable an individual who had contracted as an agent for a known principal, without alleging any facts which would create such personal liability. There is clearly a wide distinction between suing the defendant as personally liable on the contract as a contracting party, and suing him for damages for a misrepresentation, deceit, or fraud. The issues and the evidence would be very different in the two cases. In Stephen's Lush's Common Law Practice, page 309, it is remarked:—"The distinction which has been drawn is between the introduction of a new cause of action, and such amendment of the way of advancing the claim, as while it furthers the purposes of justice, leaves the demand essentially the same." I have carefully read through the cases on amendment quoted in this work. I have also read Mr. Taylor's able remarks on the subject and the instances given by him, in which amendment has been allowed. (Taylor on Evidence, Vol I., pages 208, 230.) I have, moreover, consulted the authorities in the margin, and, as far as I can judge by analogy, I think that plaintiff ought not, in the present instance, to be allowed to amend his plaint. He has sought to make the defendant liable in contract, probably at first *bonâ fide*, believing that he could do so, and mistaking his remedy, and subsequently when he discovered the mistake, endeavouring to color the transaction, so as to show that he meant to contract with the defendant, and not with the Municipality. Having failed in proving this case, I do not think he can now ask to set up a case of misrepresentation and deceit, and recover on a ground of relief entirely different.

No 1553 of 1863, Gobindo Mohapatur and others, appellants, *vs.* Madhub Prosad Pundit Surburakar, &c 10th September, 1866, VI Weekly Reporter, Civil Rulings, page 211.

Day's Common Law Practice, 2nd edition, pages 163, 165.
Pollock and Nicols' County Court Practice, pages 115-116.
Davis's Practice and Evidence in the County Courts, pages 110-113.

Judgment of the High Court.—We are of opinion that the Judge's view is correct as to both points.

FEBRUARY, 1868.

A. GROTE AND E. T. TREVOR, ESQS.

No. 5.

The following addition should be made to Rule 1, Section I, Chapter IX of the Board's Rules, at page 157, immediately after the list therein given of the Hindú Holidays.

Mahomedan officers and employès attached to the Magisterial Courts and Revenue Offices may be allowed to absent themselves from Office on the following days :—

	Days.
Mohurrum	5
Akhar-i-chahár shamba	1
Fóteha-i-dwazoohąm	1
Shob-i-Borát	1
I'd-ul-fitr	2
I'd-uz-zoha	2
Total ...	12

No. 6.

Under instructions from Government, Commissioners are requested, after careful enquiry, to report, as early as practicable, on the condition of the Sub-Divisional Treasury Buildings in their respective Divisions, and to state in each case what is necessary to render them secure.

No. 7.

The Return No. VIB, regarding Government Decrees, is to include all outstanding amounts, and to be submitted for each month regularly. Where no recoveries may have been made in the month, the reasons should be explained briefly in column 7 of the Return.

No. 8.

In the penultimate line of Clause 5, page 81 of the Board's Rules, expunge the words "can be," and *substitute* "is applied for in the following form and." The form to be appended to the Clause is given below :—

District.	Particulars of the case.	AMOUNT OF FINE.				Date on which period of appeal expired, or appeal was rejected.	REMARKS.
		Imposed.	Realized.	Distributed *at once.*	Balance *to be* distributed.		
1	2	3	4	5	6	7	8

1868.

February
REVENUE CIRCULARS.
(*Continued.*)

No 9.

Forms in which statistics of physical, political, and fiscal geography are to be furnished, will be supplied immediately to all District Officers by the Superintendent of Stationery. Last year very little care was bestowed on the filling up of the forms, and the Board request that the instructions issued in Circular Order No 8 of August, 1867, may be strictly attended to in the preparation of the Returns for 1867-68

No. 10

It has been ruled by Government that Collectors are not to exercise the power conferred on them by Section 25 of Regulation VII of 1799, of selling lands summarily at the end of the year for arrears of revenue in estates under their direct management The Collectors in such cases will proceed by suit, and sell only in execution of decree

2. Commissioners of Divisions will carefully see that this ruling is observed by their subordinates They will further report, after six months' experience, the extent to which rent suits have been increased in consequence of these orders, and whether any such practical inconvenience has arisen, as to render it desirable that the power of sale without decree, should be left in full exercise

3 Pending further orders or legislative enactment, the Board of Revenue, with the approval of Government, and under Clause 6, Section 23 of Regulation VII of 1799, prescribe the following rules, to be observed by all officers holding sales of under-tenures for arrears of revenue under the Regulation above named

I All such sales shall be public, and be conducted by the Collector, his Deputy, or duly authorized Assistant

II Ten days' notice shall be given of such sales by advertisement, to be stuck up at the Cutcherry of the Zillah Court, or local Adawlut, and at that of the Collector.

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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS, WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL, PRIVY COUNCIL DECISIONS, SMALL CAUSE COURT AND OTHER REFERENCES, &c, &c, &c.

VOLUME V.

No. 6.—March 18.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month)

UNDER THE DIRECT PATRONAGE OF THE GOVERNMENT OF BENGAL.

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1868.

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Special Appeal from Chittagong.

1868

16th January

CIVIL JURISDICTION.

CASE 1846 OF 1867.

Samud Ali and another, (Defendants) *Appellants, versus* Sreemuttee Kurreemun Nissa and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Dwarka Nath Mitter*, J.

Baboo Gopeenath Mookerjee and *Rajendronath Bose* for Appellants.
Moulvie Syud Murhumut Hossein for Respondents.

Possession of the bed of a khall ordinarily runs with that of the adjoining property; but as it dries up, it may be subject to illegal appropriation by another party, and the cause of action against such party accrues from the date of his entering on such possession.

The judgment of the Principal Sudder Ameen in this case must be reversed, so far as it relates to the question of limitation, and the case remanded to him for trial on that issue.

The statute of limitation says that the suit must be brought within the period of twelve years from the time when the cause of action arose.

When lands which are not, in their nature, capable of actual occupation, such as a khall, appertain and belong to lands which are occupied, the possession in point of law necessarily follows the possession of the lands to which the former belong. But when, as in this case, the khall dries up and becomes capable of being cultivated, if any one to whom it does not belong takes actual possession of it, a cause of action accrues to the person in possssssion of the land to which it appertains. Generally speaking, a khall would continue in the possession of the person in possession of the lands to which it appertains until it becomes culturable; for it would not be worth the while of any one to take possession of it until the possession of it is beneficial; but if any one should take possession of it before it becomes culturable, or is brought into cultivation, the cause of action would accrue at that time, and not from the time at which the khall becomes dry and culturable, or is actually brought into cultivation. It is not correct, therefore, to state that limitation begins to run from the time when the khall was brought into cultivation. That, as I understand the Principal Sudder Ameen's judgment, which is by no means clear, is the time at which he considered the cause of action accrued. He says:—"It is clear that the suit has been brought within time from the date the land was brought under cultivation;" whereas it ought to have been from the time that the defendant wrongfully took possession.

Then again he says:—"If possession be not held on the strength of title, it would not be proper to apply limitation to a suit for such bhurat land;" that is, as we understand, the defendant would not be entitled to the benefit of limitation if he had held for any number of years, unless he had held on the strength of title; whereas if he held on the strength of title, he would not require to take advantage of the statute of limitation.

There is no different law of limitation with regard to bhurat lands or khalls than with regard to other lands, though, with regard to bhurat lands or khalls, there might be more difficulty in determining the time in which wrongful possession was taken.

If the land, before it was filled up, appertained to the plaintiff's dâg, the plaintiff would be in possession of the land after it was filled up, until some other person took actual possession.

The Principal Sudder Ameen, with reference to these remarks, will have to try whether the plaintiff was in possession of the land within twelve years next before the commencement of the suit. Looking to the nature of the lands, and the presumption that the plaintiff being in possession of the dâg was by implication in possession of that which appertained to it, until some one else took actual possession, it will be for the defendant to show that he took possession of the land, whether he cultivated it or not, and whether the land was culturable or not at a time more than twelve years before the commencement of the suit.

We think the appellant ought to have the costs of this appeal.

1868.

17th January.
CIVIL JURISDICTION.

CASE 149 OF 1867.

Special Appeal from Tirhoot.

Shaikh Sultan Ali, (Plaintiff) *Appellant, versus* Mussamut Chand Bebee and others, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *Dwarka Nath Mitter*, J.

Baboo Bamachurn Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

A written statement must be taken as a whole. It is not a pleading in confession and avoidance, by which the defendant is bound by the confession and compelled to prove the avoidance.

We think that it is quite clear that the Judge is right.

The plaintiff sued the defendants for the whole of certain property which he said had been mortgaged to him. Three of the defendants, in their written statements, stated (and I assume that they swore to their written statements) that the mortgage was granted to the plaintiff, as one of four brothers, for the benefit of himself and his three brothers; that two of the defendants were two of the brothers, and that the third defendant was the widow of the third brother, and that they were in possession of the shares which belonged to them respectively; and that the plaintiff was in possession of his own share. The other set of defendants stated that they were in possession under a teeka lease granted by the four brothers in 1265.

The Principal Sudder Ameen found that the mortgage was granted to the plaintiff for the benefit of himself and his three brothers, and he accordingly decided for the defendants.

Upon appeal, the Judge says—"that, inasmuch as the deed contains the plaintiff's name alone, the *onus probandi* lay upon those whose defence rested upon varying its wording;" but he says that he cannot concur with the reasons assigned by the Principal Sudder Ameen for dismissing the case, as there was no evidence to prove that the mortgage was granted for the benefit of the four brothers; but he adds:—"I do not think that the evidence of dispossession adduced is sufficient to prove the fact, and that, as the claim of the plaintiff has not been proved, the order of the Lower Court dismissing the suit must be affirmed."

The judgment of the Judge is objected to, upon the ground that it was unnecessary for the plaintiff to prove dispossession, inasmuch as that fact was admitted by the defendants in their written statement.

A written statement is not, as we have frequently before observed, a pleading in confession and avoidance, by which the defendant is bound by the confession, and is compelled to prove the avoidance. A defendant's written statement may, like every other statement made by a defendant, be used as evidence against him, but, like every other statement made by a defendant, the whole statement must be taken together. If the written statement in the present case had been put in evidence against the defendants, then their admission of possession must be taken in conjunction with the other part, *viz.*, that, although the mortgage was taken by the plaintiff in his own name alone, it was taken for the benefit of the four brothers.

The Judge, it is true, would not have been bound to believe that part of the statement which was in favor of the defendants; but it would have been evidence upon which he might act if he believed it.

Suppose a man should be sued for goods sold and delivered, and should state, and swear to the statement, that the goods were bought and delivered to him in a shop by a person whom he did not know, and that he paid for them at the time. If that statement were true, he could not honestly state that he had never bought the goods; and if the statement that he had bought them was to be taken against him, without also taking his statement that he paid for them at the time, the greatest injustice might be done; for he would be unable to compel the attendance of the man who sold the goods, inasmuch as he was unknown to him; but if the plaintiff, being unable to read one part of the statement as evidence against the defendant, without reading in favor what he said as to payment, the plaintiff would have to cite the man who sold the goods, for the purpose of proving his case; and then, if the witness should

speak the truth, the defendant would make out his defence by eliciting from the witness, on cross-examination, the fact that the defendant had paid for the goods at the time.

We have given this explanation of our view of the effect of a written statement, inasmuch as we constantly see that there is a great misunderstanding as to the mode in which it ought to be used if intended to operate against the defendant as an admission.

The decision of the Judge therefore will be affirmed, with costs of those respondents who have appeared.

Special Appeal from the 24-Pergunnahs.

CASE 1711 OF 1867.

31st January.

Kedar Nauth Dutt and others, (Defendants) *Appellants, versus* Okhoy Koomar Bhuttacharj and others, (Plaintiffs) *Respondents.*

Before *Seton-Karr* and *Macpherson*, J. J.

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, Hemchunder Banerjee,* and *Chunder Madhub Ghose* for Appellants.

Mr. G. C. Paul and *Baboos Unoocool Chunder Mookerjee, Ashootosh Chatterjee,* and *Ashootosh Dhur* for Respondents.

Where plaintiff purchased property at a sale in execution, under circumstances leading to the inference that the purchase was fraudulent on behalf of the judgment-debtor; and where the same property was afterwards sold in execution of another decree, *bonâ fide*, to defendant, the *onus*, in a suit brought by plaintiff to set aside the second sale, is on him to prove its *bona fides*.

Seton-Karr, J.—The facts out of which this appeal arises are clearly given in the judgments of both the Courts.

Purno Purshad Roy and others held a decree against Shusheedhur Ghose, and in execution of the same, a one-anna share of a zemindary was sold on the 2nd of August, 1865, and purchased by Okhoy Koomar Bhuttacharj, the plaintiff in this suit, for Rupees 805.

The same property was again sold on the 11th of September following, also in execution of another decree against the same debtor, and purchased for Rupees 5,000 by the defendants in this suit, after the plaintiff, the first purchaser, had intervened without success.

The plaintiff, dating his cause of action from the 9th December, 1865, when his prayer to set aside the second sale was not entertained, has now sued to set aside the sale and to establish his prior purchase.

A variety of issues were drawn up, which it is not necessary to specify, and the Principal Sudder Ameen, going fully into the case, and getting over certain issues of bar and limitation in the plaintiff's favor, directed his attention to what he termed the simple issue in the case, *viz.*, whether the plaintiff had made the purchase with his own money and for his own benefit, or whether the whole transaction was based on fraud and collusion.

On the whole facts and probabilities, the Principal Sudder Ameen recorded what, taking this issue to be the correct issue in the case, appears to us a very clear judgment, to the effect that the whole of the transaction on which the plaintiff relied, and to which the ostensible decree-holder, the judgment-debtor, and the plaintiff were parties, was based on fraud and collusion, and that the judgment-debtor was in possession of the property both before and after the sale contended for by the plaintiff, while the defendant had, in reality, subsequently purchased the right, title, and interest of the debtor.

On appeal, the Judge reversed this decision, on the ground that, though the plaintiff's version of affairs was unsatisfactory, and though it was extremely probable that the transaction was *benamee*, there was no evidence of fraud, and no evidence that the property was the property of the debtor, Shusheedhur, at the time of the defendant's purchase, on the 11th September, 1865.

In special appeal, two main points are urged by Mr. Doyne:—

First.—That the suit will not lie, as the plaint discloses no cause of action.

Second.—That the Judge has lost sight of the real point at issue between the parties, and has gone off on the question of fraud, without finding whether the purchase was actually made for the plaintiff, or without saying who, in fact, was the purchaser at the first sale in August.

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31st January.
CIVIL JURISDICTION.

In regard to the first point urged by Mr. Doyne, I have to observe that i was never put forward in either of the Courts below, as it certainly might have been. Issues in bar and limitation were urged before the Principal Sudder Ameen, and were dropped before the Judge, but no plea in bar of the plaint, as disclosing no cause of action, was taken up; and even if we could allow such a plea to be now taken as that, the suit will not lie at all. We should be disposed to answer it by saying that, though the plaintiff was wrong in saying in his plaint that he brought his suit under Section 299 of Act VIII of 1859, he ought certainly to be permitted to sue under either of the Sections 246 or 247.

His objections to the sale were not entertained, but he would be at liberty to bring his suit within one year to establish his right, and to set aside the sale under one of those Sections last named.

Overruling the first objection therefore, we came to the second main point, and here I am of opinion that the decision of the Judge is so wrong in law that it cannot be permitted to stand.

The Judge, after going through the very cogent arguments on which the Principal Sudder Ameen based his decision in the defendant's favor, does not refute any one of them, nor, as we read his decision, does he take a materially different view of the weight of the evidence.

He begins by saying that—"all the circumstances noted (*i. e.*, by the Lower Court) are consonant with an hypothesis that the judgment-debtor's uncle, Bungsheedhur, purchased the estate in the name of the plaintiff; and if it were so, no great inference of fraud can be drawn from them."

The Judge then goes on to say that mere collusion does not establish fraud; that it would have to be shown that the original decree was obtained collusively, which had not been attempted; and that there was nothing from which a legal inference of fraud could be drawn.

The Judge admits that the plaintiff's account is unsatisfactory, and that it might justify the Court in finding that his name had been used by some one else, and that he was not the real purchaser. He also says that it appears probable, on the evidence, "that the plaintiff was put forward to purchase, and his name was used by some one else." He says that a certain portion of the record goes to prove that Bungsheedhur, or some of the family, purchased; but it does not establish that for which the defendants contend, (*viz.*, that the judgment-debtor was the real purchaser. Here, obviously, the Judge throws the *onus* on the defendants, as he again does in a subsequent part of his judgment, in discussing the connection between Bungsheedhur and the debtor, and the question of payment of rents of the ryots.

The Judge also appears to me to have wrongly applied the case* lately decided by the Privy Council—Sreeman Chundra Deb *versus* Gopal Chunder Chuckerbutty—to the case before him.

* Wyman's Reporter, III., Part VI, page 5.

The facts in that case were different. It was not exactly a case between two rival purchasers at sales. It was a case in which a plaintiff sued as the assignee of a judgment-creditor; and he wished to have it declared that the defendant's purchase at a sale in execution of a previous judgment was bad. There he came forward to prove that the talook which he had purchased as assignee was not affected by the subsequent transfer, and that it was still the property of the judgment-debtor, and not that of the subsequent purchaser. To apply the principles in that case, as decided by their lordships, to the case before us, we should require strict proof of his allegations from the plaintiff, respondent, and should not put the *onus* on the defendant, which is what the Judge has done. In fact, the principles of their lordships, if applicable to the case before us, ought to have led the Judge, on his own showing of facts, to an opposite conclusion to that at which he has arrived.

On the whole case, I am of opinion that the Judge has put the *onus* far too heavily on the defendants; that he has had his attention diverted from the main issue; that he has not required from the plaintiff strict proof of his allegations; that he has misapplied the decision of the Privy Council; that he has no

found what he ought to have found, before the plaintiff could be entitled to a decree; and that, on the Judge's own showing, the plaintiff should be put out of Court.

The plaintiff coming in to reverse a sale, in regard to which his objections had not been entertained, is bound to prove his title and his purchase, and cannot be allowed to derive any benefit from inferences of a benamee purchase, which was not the case disclosed in the plaint.

The Judge does not really displace the finding of the Principal Sudder Ameen, to the effect that, at the time of the second sale, the property was still that of the judgment-debtor. I am of opinion that in a case like this, where the facts have been fully gone into in both Courts, where there has been no defective enquiry at all, and where the decision of the Lower Appellate Court is manifestly erroneous in law, it would be wrong and unnecessary to remand the case for any fresh decision, or to put the parties to further expense.

The conclusion which the Judge has formed being, on his own showing, erroneous in law, and there being no finding that the plaintiff has himself purchased the property and made out his own title, we ought at once to reverse the decision of the Judge, and restore that of the Principal Sudder Ameen, with all costs.

Macpherson, J —Whatever force there might have been if the point had been raised at the proper time, in Mr. Doyne's contention, that the suit will not lie as seeking a merely declaratory decree, I think the objection cannot now be taken, as it never was taken until the case was before us in special appeal, after having been tried and decided by both of the Lower Courts upon that which is the real issue between the parties.

I agree with the Judge below in the opinion that the only true issue in the case was that which was raised by the Principal Sudder Ameen, whether, namely, the purchase at the first sale was really made by or on behalf of the judgment-debtor himself, so that the right of ownership never was transferred from the judgment-debtor to the plaintiff. It was wrong in the Lower Appellate Court to go into any question of fraud or collusion on the part of the holder of the decree under which the plaintiff purchased; for, without any fraud or collusion on his part, it might well be that the sale did not transfer the ownership from the judgment-debtor.

But the error which seems to me of most importance, and which, I think, vitiates the judgment of the Lower Court, is this,—that the Judge apparently considered himself bound by the decision of the Privy Council in the case of Sreeman Chunder Dey *versus* Gopaul Chunder Chuckerbutty, III. Wyn[illegible]'s Reporter, page 5, P. C., to hold that the facts did not amount to legal pro[illegible] of that which the defendants had to prove. I think he was wrong in this, and that there is nothing in their lordships' judgment which leads to the conclusion that the proof for the defence is insufficient.

Sreeman Chunder's case has doubtless some points in which it resembles this case. But the position of the parties, and the facts, are very different; so different indeed, that the decision in the one case does not necessarily lead to a similar decision in the other.

In Sreeman Chunder's case, the plaintiff was not the purchaser at the first sale, but the assignee of another judgment; and he sued for a declaration that the purchase of a certain talook at a sale in execution of a decree did not effect a transfer of the ownership of the property. Of course, the plaintiff had throughout to maintain the affirmative that the talook remained the property of the judgment-debtors, and never became the property of the defendant.

In the present case, the plaintiff having been declared the purchaser at the first sale, and being, as he alleges, in possession, sues substantially for a declaration that the subsequent purchase by the defendants is worthless, and passed nothing to them, as the ownership of the property had previously been transferred to the plaintiff. Here the *onus* is in the first instance on the plaintiff, who must prove that the right of ownership is in him, which he has no difficulty in doing by proving his purchase and possession in the ordinary way. The

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plaintiff having proved this *primâ facie* title, it lay on the defendant to rebut it, and show that the ownership was not transferred to the plaintiff. This, it appears to me, on the Judge's own statement of the facts proved, the defendants did very sufficiently. Certainly they did so to such an extent as to make it necessary for the plaintiff to prove distinctly that the ownership was really transferred to him, so as to make it pass entirely from the judgment-debtor.

The facts found in Sreeman Chunder's case do not prove that the property never passed from the judgment-debtor at all, in the same degree that the facts found in the present case lead to that conclusion.

The evidence in that case was weak in the extreme, as compared with the evidence in this. And it is an entire misapprehension to suppose that, because the Privy Council held the evidence before them was insufficient, their lordships laid down, or meant to lay down, as a rule, that evidence so cogent as that found by the Judge in this case would also be insufficient. The Privy Council decided the case before them upon the special facts of that case (which were in many respects very peculiar); and it would be most dangerous to hold that observations made by their lordships with reference to those special facts are to be read as general rules applicable to a wholly different state of facts.

It appears to me that the view which the Judge has taken of their lordships' judgment is erroneous, and that the error pervades his own decision, and is, in truth, the basis of it. The judgment of the Court of first instance is clear and good. The Judge does not differ substantially from the Principal Sudder Ameen as to what are the facts proved, but he differs in this—that he thinks these facts do not amount to legal proof that the property never passed under the first sale from the judgment-debtor.

I think that the judgment of the Principal Sudder Ameen was right, and that the Judge has given no good reason for reversing that judgment, and that the grounds upon which the Judge has reversed it are wrong in law.

For the reasons I have expressed, I think there has been a substantial error in the trial of the case in the Lower Appellate Court, which has produced error in the decision of the case upon the merits, and therefore that the judgment of the Lower Appellate Court ought to be set aside, and that the judgment of the Principal Sudder Ameen ought to be affirmed.

The respondent will pay all the costs, both here and in the Court below.

CASE 351 OF 1867.

31*st January*.

Regular Appeal from Backergunge.

Dwarkanath Dass Biswas and others, (Defendants) *Appellants*, *versus* Manick Chunder Dass, (Plaintiff) *Respondent*.

Before *Kemp* and *Jackson*, J. J.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellants.
Baboos Romesh Chunder Mitter and *Girza Sunker Mozoomdar* for Respondent.

On the sale of a talook named under Regulation VIII, 1835, all subordinate tenures do not necessarily lapse.

In a suit for mesne profits of such a talook, when defendants show that they had not and could not have collected direct from the ryots, plaintiff can only recover what defendants collected from the subordinate talookdars.

This was a suit to recover mesne profits laid at Rupees 25,000.

The plaint sets forth that the plaintiff is the purchaser at a public sale, under Regulation VIII of 1835, of a zimma talook, by name Prannath Indoo, situated in Hissa, five and three-fourth annas, Pergunnah Selimabad, Zillah Backergunge; that the defendants, from the date of the plaintiff's purchase, or from the 13th Srawan, 1262, B. S., have forcibly retained possession of the lands of kismuts Kurfa, Jotcharee, Brimun Katee and Soohunkar Katee comprised in the aforesaid talook; that the plaintiff instituted a suit to obtain possession of these kismuts, and obtained a decree in this Court on the 26th January, 1865. The plaintiff abandons his claim to mesne profits which have accrued for a period more than six years.

The defence was that the claim to mesne profits for 1266 was barred by the statute of limitations, and that the defendants were liable for only so much as they had collected from the holders immediately subordinate to them, *i. e.*, the ousut talookdars.

The Judge held that the claim for the mesne profits of the year 1266,

B. S., was not barred, on the principle laid down in the case of Moharaja Kowar Ramaput Singh *vs.* Mr. Forlong, Weekly Reporter, Volume III, page 38, Civil Rulings.

As to the principle upon which mesne profits are to be awarded, the Judge makes the following observations:—"The defendants allege that they have never been in immediate possession; that the whole lands are let out in ousut talook; and that they have only received the ousut talookdaree rent, amounting to about Rupees 156-10-8 per annum, and that therefore they cannot be held liable for more than they have actually received. To prove their actual receipts, they file rent accounts, together with chalans to prove them." Of these documents, the Judge observes that most of them have been spoken to by witnesses; that the plaintiff alleges them to be forgeries; and that they may have been prepared for the purposes of this suit. This may be so, says the Judge; and further he remarks "that in some instances their appearance is against them, for the writing looks fresher than the paper, and fresher than the alleged age would warrant." He looked upon these documents with considerable suspicion; but even if they be admitted to be genuine, they will not, thinks the Judge, assist the defendants, for the plaintiff has been many years out of possession; so long indeed, that he has been a great loser, having to abandon a portion of his claim. The defendants cannot be permitted to profit by their own wrong, and the principle laid down by a Full Bench of the High Court in the case* of Kanae Dass and others seemed applicable to the case; for it is there remarked that "when a party is declared entitled to a decree for mesne profits, such sums as may have been collected and appropriated by others in wrongful possession, or such sums as he, the party ousted, wrongfully would have collected had he been in possession, and which he was prevented from collecting by having been kept wrongfully out of possession, ought to be awarded."

* Weekly Reporter, Special No. page 40, Hay's Decisions, page 266.

The Judge then remarks that if the plaintiff had not been kept wrongfully out of possession, he would have collected rents immediately from the ryots, inasmuch as he purchased the zimma free of all incumbrances set up by the defendants. It is true, the Judge observes, that the plaintiff cannot show that the defendants have collected direct from the ryots, but that, nevertheless, the plaintiff was entitled to recover as mesne profits what the defendants might have collected from the ryots. An Ameen was deputed to ascertain the rates paid by ordinary ryots in the neighbourhood of the disputed properties, and the rate so ascertained was assumed by the Judge to be a fair rate, and what the defendants ought to have collected.

Mesne profits were awarded, amounting to Rupees 16,558-15-9, with costs in proportion.

In appeal, the only contention has been as to the principle upon which the wassilat is to be awarded. We may premise by observing that the plaintiffs purchased the zimma talook at a sale under the provisions of Regulation VIII of 1835. This Court has held, in reversal of the decision of the Zillah Judge, that the plaintiffs acquired the zimma free of all incumbrances. The question is one that admits of much doubt. The decision of this Court is pending in appeal before their lordships of the Privy Council, and we refrain from further remarks on the subject. The ousut talooks, subordinate to the talooks of the defendants, were created before their purchase of the parent zimma; and it apears to us very clear that the defendants could only have collected from them, and not from the immediate occupants of the soil. Indeed, we have been shown that the defendants, during their incumbency as zemindars, attempted to get rid of these ousut talookdars, and to collect the rents from the ryots, but were foiled after litigation.

The plaintiff, even if he had not been kept out of possession of the zimma talook, would not have been entitled to collect from the ryots, but must have contented himself with receiving rent from the ousut talookdars as the defendants have done.

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The Judge is, in our opinion, wrong in law in holding that, on the sale of a talook under the provisions of Regulation VIII of 1835, all subordinate tenures, such as ousut talooks, howalahs, and neem howalahs, necessarily lapse. It would depend very much upon the terms of the pottah or grant under which the original talook was created, and the reservations therein expressed or implied.

The defendants have put in their collection papers and the challans of the ousut talookdars for a series of years, which have been, as admitted by the Judge, supported by evidence. In the Court below the plaintiff, as admitted by the Judge, could not show that the defendant had collected from the ryots, nor has the pleader of the plaintiff, respondent, before us, attempted to throw discredit upon these documents, which do not appear to us to be open to the suspicions hinted at by the Judge. The ousut talookdars too were examined by the defendants, who did all that was in their power to prove at what rate they collected during the period in dispute.

The ruling of the Full Bench quoted by the Judge, Sutherland, at page 41, Special No., Weekly Reporter, is not applicable to this case; for it is clear that if the defendants had at once given up possession of the zimma to the plaintiff on his purchase, the plaintiff would not have been entitled to collect direct from the ryots, ignoring all the intermediate tenures between him and the actual occupants of the soil, commencing with the ousut talookdars who had successfully resisted the attempts of the zemindars to pass them over.

We therefore amend the decision of the Judge, and decree wassilat from 1266 to 1272 at the rate of Rupees 156-10-8 per annum, with costs in proportion. Excess costs in the Lower Court payable by the respondent to the appellants with interest. The whole of the costs of this Court to be paid by the plaintiff, respondent, to the appellants with interest.

CASES 44, 45, 46, AND 68 OF 1867.

3rd February.

Miscellaneous Appeals from Cuttack.

Deendoyal Shahoo, (Decree-holder) *Petitioner, versus* Radha Muddun Mohun Dass, (Judgment-debtor) *Opposite Party.*

Before *Peacock*, C. J., and *Seton-Karr*, *L. S. Jackson*, *Macpherson*, and *Hobhouse*, J. J.

Baboos Unnoda Pershad Banerjee and *Obhoy Churn Bose* for Petitioner.
Baboo Romesh Chunder Mitter for Opposite Party.

Several decree-holders had decrees against the same judgment-debtor, and each claimed to have his decree satisfied from a sum of money belonging to the debtor in the Collector's hands. The Lower Court, treating the whole of the applications together, directed a rateable division of the money among them all, rejecting a proposal to satisfy the decrees according to the priority of attachments made under them. *Held* that there was no appeal against this order, as it substantially affected only the rival decree-holders.

These cases were referred to the Full Bench on the 20th June, 1867, under the following orders recorded by L. S. Jackson and Macpherson, J. J.

Macpherson, J.—These are appeals from orders passed by the Principal Sudder Ameen of Cuttack as to the distribution of a sum of money attached in the hands of the Collector under Section 237 of Act VIII of 1859 by the holders of several decrees.

Hattee Lall Bhuggut and Dwarkanath Bhuggut, the appellants in the appeals numbered 45 and 46, had two decrees against the judgment-debtor, and are said to have been the first to attach the fund in question, which was subsequently also attached by the other decree-holders now before us claiming to hold the first attachment. Hattee Lall and Dwarkanath Bhuggut presented petitions in their two suits to the Principal Sudder Ameen, praying that their decree might be satisfied out of the money which they had attached. The other decree-holders presented similar petitions in their suits. The Principal Sudder Ameen directed that all the petitions should be brought up for hearing at the same time. This was accordingly done, and the Principal Sudder Ameen passed a separate order upon each petition, the effect of the orders being to declare that the appellants in the appeals Nos. 45 and 46 were entitled to the costs incurred by them in a suit which they had brought to establish that the fund in the Collectorate belonged to their judgment-debtor; but that as regards the rest of their claims, they were entitled only to share in the fund rateably, with the other decree-holders, who had subsequently attached it. The appellant

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thereupon petitioned this Court, stating the facts, contending that the orders of the Principal Sudder Ameen were illegal, and made without jurisdiction, and praying that the High Court would reverse the orders in the exercise of its general powers of superintendence, under the 15th Section of the High Court's Charter, Act 24 and 25 Vic., c. 104.

Upon these petitions, the following order was, on the 14th February last, passed by the Division Court (*Norman* and *Seton-Karr*, J. J.,) before whom they came on for hearing:—"In this case it seems tolerably clear that the petitioner has a remedy by appeal, and that remedy it is for him to pursue. We therefore make no order upon this application."

On this order being made, the present appeals were filed. In Nos. 45 and 46 the respondents are Radha Muddun Mohun Dass, who is the original judgment-debtor, and Deno Nauth Sirkar and Kany Lall Pundit, who are two rival decree-holders. In appeal No. 44 a rival decree-holder, Deendyal, is appellant, and the judgment-debtor and Deno Nauth Sirkar and Kany Lall Pundit, decree-holders, are respondents. In No. 68 Kany Lall Pundit is appellant, while the judgment-debtor and Hattee Lall Bhuggut and Deno Nauth Sirkar are the respondents.

If the appellants in the appeals Nos. 45 and 46 had the first attachment, it seems to me that the order of the Lower Court, putting them merely on the same footing with those who had subsequently attached the fund, was entirely wrong, and that the Court should have applied the fund attached in satisfaction, in the first instance, of the decree under which it was first attached, before applying any portion of the fund in satisfying the decrees under which the subsequent attachments were made.

But it is contended that these appeals will not lie, as the question is not one arising between the parties in the several suits, and therefore does not fall within the provisions of Section 11 of Act XXIII of 1861. And the decision of the Full Bench in the case of Misree Koonwur *vs.* Mohessur Buksh Sing, Weekly Reporter. Full Bench, page 116, is referred to. In that case the Full Bench held that, as between rival decree-holders, there is no appeal from an order made under Sections 270 and 271 of Act VIII of 1859 as to the distribution of the proceeds of the sale of property which has been sold in execution, when there are attachments on it issued under several different decrees. It is not under these Sections that the orders complained of were made; for the attachment of the money in the hands of the Collector was made under Section 257, and the decree-holders applied under Section 242 to have their decrees satisfied. But although Sections 270 and 271 apply only where property has been sold in execution, which is not the case before us, still it appears to me that the principle of these Sections must guide us in dealing with moneys attached under Section 237. The decision of the Full Bench also must guide us, so far as it goes; but it does not determine the question now before us.

In Misree Koonwur's case the appeal (so far as can be gathered from the published report of it) was by a rival decree-holder. In the present instance, however, there is this material difference, that the parties in the several suits are parties both to the proceedings in the Lower Court and to these appeals.

The applications made by the decree-holders to the Lower Court were simple applications made by them against their judgment-debtor. The original question was thus solely between the parties to each suit, and as such came within Section 2 of Act XXIII of 1861. The Lower Court might have dealt with each application, especially with that of the decree-holder's who had the first attachment, on its own merits. It may be that in any suit a rival decree-holder (claiming under a decree and attachment in another suit) might have applied in order to ensure that such portion of the surplus proceeds as he was entitled to might not be paid away in that suit. But an order made on such an application would still be an order upon a question arising between the parties. How much of a fund which has been attached is to be applied in satisfaction of the plaintiffs' decree is a question between the parties,—a question between the judgment-debtor and the judgment-creditor, even

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although the question may have been chiefly raised by a rival decree-holder In the cases now before us, the Lower Court itself treated every one of these applications as made between the parties in the several suits, and between the parties only; and in no suit has it made any order, except between the parties to it. Although the relative positions of the several decree-holders who have attachments may be involved in the orders made, such order is still, in itself, an order in its own suit, and is not made as among strangers.

The appellants have made not only the judgment debtors, but some of the rival decree-holders, respondents. The rival decree-holders not being parties to the suit, it may be wrong to make them parties to the appeal. But the appeals will, in my opinion, lie, so far as they concern parties, although they may not lie as regards those who are not parties.

I express this opinion with considerable hesitation, because, although it is in accordance with the view of the question taken by Norman and Seton-Karr, J. J., as indicated in their order of the 14th of February last, I am not without doubts that it is in conflict with the spirit of the Full Bench decision, if not with the direct rule laid down in it.

I think that the question which has now arisen ought to be referred for the decision of a Full Bench. The question is whether the appellants in these cases, or in any of them, have a right to appeal against the orders passed by the Lower Court; and if so, whether against all or any of the persons whom they have made respondents respectively. In deciding this question, the Full Bench will, as it appears to me, have to decide which is the proper procedure in cases where rival decree-holders claim to be paid out of a fund which has been attached under Section 237 under several decrees.

Jackson, J.—I concur with my brother Macpherson in referring this case for the consideration of a Full Bench.

The question for decision, I think, will be this:—

A is entitled to a fund in the hands of a public officer (not a Court of Justice), B, C, and D all having decrees against A in the same Court. In that Court, at the instance of one of them, B attaches the fund under Section 237, Code of Civil Procedure; the other creditors also obtain attachment.

The Court, taking up the *seriatim* execution cases of these several creditors, records an order for the distribution of the fund rateably among the creditors, after payment of a sum allowed as costs to one of them who had brought a suit to try A's right to the fund.

Has B a right of appeal (on the ground that he was entitled to be paid in full) as having first attached?

First.—Against A?

Second.—Against the other creditors?

I myself do not think that he has the right of appeal.

First.—Against A, because there is really no contest between him and A. The fund is in the custody of the Court. Whatever be the result, A cannot expect, nor does he seek, to get any part of it back; and it is quite immaterial to him whether B gets the whole of it, or it is distributed between B, C, and D.

Therefore A has no interest in the dispute, and cannot be called on to pay costs; and to bring an appeal nominally against A, in order to determine a question really between B and C, appears to me absurd.

Second.—As against the other creditors, I think there is no appeal, because the principle, at least, of the Full Bench Ruling cited, applies and excludes an appeal against them.

I am not much pressed by the opinion of Norman and Seton-Karr, J. J., who thought an appeal would lie, because, with all respect for those learned Judges, I understand that opinion to have been given upon an *ex-parte* application, and therefore without hearing argument for the opposite view of the case.

It seems to me that some provision of the law is very much wanted which would enable the Courts, in circumstances such as we have stated, to

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array the parties in one proceeding, and to decide actually and openly between them, and providing such appeal as may be thought necessary.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J.—It appears that there were several decrees against the judgment-debtor in this case, and that a sum of Rs. 29,000 and odd had been paid into the Collector's hands as belonging to the judgment-debtor, arising from a surplus upon a sale of an estate belonging to him for arrears of Government revenue. Section 270 of Act VIII of 1859 directs that whenever property is sold in execution of a decree, the person on whose application such property was attached shall be entitled to be first paid out of the proceeds thereof, notwithstanding any subsequent attachment of the same property by another party in execution of a prior decree. One of the judgment-creditors having attached, in execution of his decree, the money in the hands of the Collector for Rs. 12,000, contended that he was entitled to have his decree satisfied in preference to the other execution-creditors. It was contended that as the property was money in the Collector's hands, arising, not from the sale of property in execution of the decree, but from the surplus of the proceeds of a sale for arrears of Government revenue, the case did not fall within that Section, and that consequently the plaintiff, who first attached the money in the Collector's hands for the Rs. 12,000 decreed to him, was not entitled to be satisfied out of it in preference to the other execution-creditors. The other decree-holders also applied to have their claims satisfied out of the Rs. 29,000; but there was not sufficient to satisfy them all. Before it was decided what amount each of the creditors was entitled to be paid out of the fund, a difficulty arose in consequence of its appearing that the estate which had been sold for arrears of Government revenue had stood in the name, not of the judgment-debtor, but in the name of a third person. The execution-creditor who had first attached the money was therefore directed to bring a suit to try whether the property which was in the hands of the Collector was or was not the property of the judgment-debtor. That suit was decided in favor of the plaintiff; and it was held that the property was liable to satisfy one or more of the decrees; but several applications having been made to the Judge by the several execution-creditors, the Judge directed the Principal Sudder Ameen to take up all the cases together. It appears to me that the object of that order was that, upon hearing all the parties, the Principal Sudder Ameen should decide whether the creditor who had first attached the property was entitled to have the whole amount of decree satisfied in preference to the others, or whether all the creditors were entitled to be paid *pari passu*. The Principal Sudder Ameen, on giving judgment, stated that, in his opinion, the money not having arisen from the sale of property in execution, the judgment-creditor who first made the attachment was not entitled to have the whole amount of his decree satisfied, but was only entitled to be paid *pro rata*, thereby meaning that, having regard to the other execution-creditors, he was to have only his fair proportion of the property attached. Now, it appears to me that all the execution-creditors were proper parties before the Court for the purpose of determining whether the first execution-creditor was entitled to be paid the full amount of his Rs. 12,000, or whether the other decree-holders were entitled to be satisfied in proportion to the amounts of their several decrees. There does not appear to be any express provision in the Code of Civil Procedure as to how several execution-creditors, who have separate claims to have their decrees satisfied out of property which has been attached in execution, are to come in and have the matter decided between them. But there must be some mode of doing it; for instance, suppose all the execution-creditors, who claimed subsequently to that one who had first attached the property, had said:—"It is true that you, the first execution-creditor, did attach the property first, but your judgment was a fraudulent one; it was a judgment in collusion with the judgment-debtor, and you attached the property under that decree, not for the purpose of satisfying a *bonâ fide* debt due to you, but for the purpose of protecting the property from the other decree-holders for the benefit of the judgment-debtor."

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There must be some mode of trying such a question between the several claimants in the Court out of which the executions issued. Such a question could not properly be tried merely between the execution-creditor who first attached the property and the judgment-debtor, without giving the other judgment-creditors the power of coming in and being heard upon the question of collusion.

The Judge having directed the Principal Sudder Ameen to hear all the cases together, substantially made all the execution-creditors parties to the hearing. The question was not one to be determined in each of the suits between the parties to such suit alone; but it was a question between all the execution-creditors as to how the money attached in one of the suits was to be distributed. It was not therefore an appealable case within Section 11, Act XXIII of 1861.

The Principal Sudder Ameen heard all the cases together, and made separate orders in each suit, in which he awarded the money attached to be paid to the several judgment-creditors in proportion to the amounts of their several decrees. If each of those orders were merely between the execution-creditor and the judgment-debtor in the particular suit, it was wrong, because, as between them, if there had been no other execution-creditors, the judgment-creditor ought to have been paid the whole amount of his decree, the Rs. 29,000 being more than sufficient to satisfy the whole of it. It was in consequence of the other execution-creditors having claimed to be paid, that the claim of the creditor who had first attached the money to be paid the whole amount of his decree was disputed. It appears to me that the Principal Sudder Ameen, whether he was right in his decision or not, which is a point not necessary to be decided now, was not correct in drawing up separate orders in the separate suits. He ought to have drawn up one order in all the suits which were heard together under the order of the Judge, and by that order to have adjudicated upon the several rights of the several execution-creditors to be paid out of the moneys attached. If the order had been drawn up in that manner, it would not have been appealable under Section 11, Act XXIII of 1861. The Code of Civil Procedure enacted that there should not be any appeal from an order passed in execution of a decree, but that enactment was altered by Section 11 of Act XXIII of 1861, which gives an appeal upon all questions relating to the execution of a decree arising between the parties to the suit in which the decree was passed.

Now, the several appellants and respondents were not parties to any one suit, but were severally parties to several suits in which the separate decrees were obtained. Under the order of the Judge, they all became parties to one hearing as to the mode in which the funds attached should be distributed. The appeals are not appeals simply between the parties to the suit in which any of the decrees were obtained, but between those parties and the plaintiffs in other suits.

Can we then in each of these appeals order all the respondents who were not parties to the several suits to be struck out, and try each of the appeals separately as an appeal between the execution-creditor and the judgment-debtor in the suit, omitting all the other parties? It appears to me that the Principal Sudder Ameen was right in hearing the case of all the claimants together, and that the several orders were substantially only one order made upon one hearing in one case to which all the execution-creditors in the several suits were parties, and consequently that it was an order from which no appeal would lie. The respondents in each of these appeals having been properly made respondents, they cannot be struck out, upon the ground that they ought never to have been made respondents. It appears to me therefore that in those cases no appeal lies.

The whole of the appeals will be dismissed with costs.

Seton-Karr, J.—I am of the same opinion.

The learned Chief Justice has so clearly stated the facts, that it is unnecessary for me to recapitulate them. I was one of the Division Court which refused to accede to the motion brought before us, praying that the Court would exercise its alleged power of interference under the 15th Section of the High

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Court Act. Nothing that I have heard to-day leads me to think that we were at all wrong in refusing so to exercise any interference. At that time we stated that it seems tolerably clear that the petitioner had a remedy by appeal. I am still of opinion that if the question had been confined to a simple question between the judgment-creditor and the original debtor, and if it had not embraced or affected the interests of other parties, there would have been an appeal to the High Court, whether the appeal had been brought by the judgment-debtor objecting to something as too favourable to the creditor, or by the judgment-holder in respect to something which affected the judgment-debtor alone. But, after considering the various Sections of the Code applicable to such proceedings, I do not find that there is any power given to us to interfere in appeal between rival decree-holders. I think with the learned Chief Justice that it is not now competent to us to strike out the names of the rival decree-holders who have been made respondents, then to decide a question which, though apparently limited to one between the first decree-holder and the original debtor, in reality seriously affects and alters the position, rights, and claims of other rival decree-holders.

The judgment of the Full Bench, reported at page 572 of Marshall's Reports, rules that there is no appeal from an order made under Sections 270 and 271 of Act VIII of 1859, as regards the application and the distribution of the proceeds of property sold in execution under the decree of a rival decree-holder. I do not lose sight of the facts that, in this case, the property in deposit does not arise out of a sale made in execution of a decree, but out of a sale for arrears of Government revenue. But I think the same analogy applies; and, at any rate, as I am not able to find that there is any appeal given to parties to this Court by any express terms or Section of the Code fairly construed, I must come to the conclusion that there is no appeal.

I think it might possibly be convenient, as stated by my learned brother Jackson, who referred this case for the decision of a Full Bench, if the Courts were empowered to array rival decree-holders and to decide questions arising between them in execution of decrees. That, however, would be a question for the Legislature; and in these cases the first decree-holder (the appellant before us) might have had his remedy by including all the rival decree-holders in a separate and regular suit to have his right declared that the property should remain in deposit in the Collectorate, or that he should be entitled to be first paid off in full.

Jackson, J.—I am also of the same opinion.

It appears to me quite impossible with regard to the question mooted in this appeal as being in any sense a question between any decree-holder and the judgment-debtor; it is, it seems to me, wholly a question between rival decree-holders. The appellant has come into this Court confessedly to endeavour to induce the Court to exercise its power, whether appellate or supervisory, to get rid of an order to his prejudice and in favor of other decree-holders. The Code of Civil Procedure, as pointed out by my lord, does not contain any specific rules for bringing together into one cause of hearing the claims of several decree-holders, although it is manifest, from a consideration of the Sections 270, 271, and 272, that many questions between such parties must arise, and the Court is empowered to hear and determine them. And so, in like manner, in respect of questions arising under Section 237, questions arise, but no mode of procedure for determining them is laid down. In the absence of any such definite procedure, the Principal Sudder Ameen, although he had first ordered that these several cases should be brought up at once and heard together, has found no other course as to recording his decision, but that of writing down a copy of the decision at which he arrived on each one of the cases between the several decree-holders and the judgment-debtor, and this accident of form, it seems to me, has probably suggested the notion that the cases may be looked upon and dealt with as isolated cases between the several decree-holders and the judgment-debtor; but that, it seems to me, is a mere form, and we should be blinding ourselves to the substance if we attempted to deal with the

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case in that way. Whatever the advantages or disadvantages may be in the matter of taking up appeals, we are bound by the Letters Patent of our Court, and the 16th Section expressly provided that this Court shall exercise appellate jurisdiction in those cases which, by any law or regulation in force, are subject to appeal in the High Court. We cannot go beyond that Clause. Section 364 of the Code of Civil Procedure clearly provides that "no appeal shall lie from any order passed after decree, and relating to the execution thereof, except as thereinbefore expressly provided;" and reference was then made to Section 283 of the Code. That Section 283, which gave the Courts, in execution proceedings, power to determine certain questions between the parties to the suit, and which provided appeals in these cases, has been expanded into Section 11, Act XXIII of 1861. By the terms of that latter Section, Courts in execution of decrees have received somewhat larger powers in the determination of questions between parties to the suit. Whenever the Courts have received extension of original powers in those cases, the appellate jurisdiction has also been extended. But as this is not, it seems to me, a question—in any sense a question—between the parties to the suit, it is not a question under Section 11, and the appeal is consequently not allowed.

Macpherson, J.—I quite concur that, as regards the rival decree-holders in these cases, there is no appeal. But as regards the actual judgment-debtor, I still incline to the opinion which I expressed in referring the case, that the appeal lies in each case as against him alone, the order appealed from being solely between the parties to the suit in which the order was made.

Hobhouse, J.—I am of the same opinion as the learned Chief Justice and my learned brothers Seton-Karr and Louis Jackson, J. J.

The material facts are that in the Court of the Principal Sudder Ameen there were several decree-holders holding decrees against one and the same judgment-debtor.

There was also a sum of money payable to the judgment-debtor in the hands of an officer of Government, within the meaning of Section 237, Code of Civil Procedure.

Each of the decree-holders claimed a portion of that sum in satisfaction of his decree, and the aggregate of the claims of all the decree-holders was in excess of the sum in deposit.

The Principal Sudder Ameen lumped all the decrees together, and passed one and the same order on all of them, and by that order given, as I should suppose, under Section 342, declared that each decree-holder should receive a part of the sum of money in question rateably according to the amount of his decree.

Certain of the decree-holders now appeal, and the substantial relief they claim is that each should be paid his decree in full, as far as the money in deposit will go, according to the priority of attachment, and to each appeal the rival decree-holder as well as the judgment-debtor are made parties.

The question before us is whether such an appeal will lie.

I agree that this was not a procedure under Section 270 of the Act. If it had been, an appeal would certainly have been barred under the Full Bench Ruling to be found in Marshall, page 527.

I agree also that there is no precise procedure laid down, and that yet, when all the decree-holders were before the Principal Sudder Ameen, at one and the same time, praying for execution of their several decrees under Sections 237 and 242 of the Act, the Principal Sudder Ameen was bound to pass an order on the prayer of each one of the applicants.

The Principal Sudder Ameen did pass such an order, and this was "an order passed after decree and in execution thereof."

Then Section 364 says that no appeal shall lie from any such order, except as expressly provided, and Section 11, Act XXIII, 1861, only modifies Section 361 in so far as regards questions between parties to a suit.

Now, here, the question is not one between parties to the suit; it is substan-

tially and really a question between rival decree-holders,—a question as to whether each shall receive certain money according to priority of application for execution of decree, or whether all shall receive rateably; and the test is this, that if we were to give the appellants the relief they ask, we should have to decide as between each of them as a rival decree-holder, and not as between each of them and their common judgment-debtor, who has no voice and no interest in the question in dispute.

For these reasons I hold that no appeal lies in the case before us.

Special Appeal from Tirhoot.

CASE 1926 OF 1867.

4th February.

Jugo Mohun Lall, purchaser of the suit, (Plaintiff) *Appellant, versus* Buddoo Koomar and others, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *E. Jackson*, J.

Baboo Debendro Narain Bose for Appellant.
Mr. R. E. Twidale for Respondents.

A chose in action is in the Mofussil assignable.

This case must be remanded to the Judge to be tried upon the merits. He says:—"The Moonsiff dismissed the claim. He has found that the case is a false one, which has been got up by a Vakeel of this Court, Aodun Lall. The Vakeel is one of the witnesses, and the purchaser of the suit is his son-in-law."

If the Moonsiff's decision had been upheld by the Judge, Aodun Lal is not a proper person to be a Vakeel of the Court, and in that case the Judge ought to take further steps against him. But the Judge did not enter into that question, but says that, "as to the purchase of the suit, there is no denial. The alleged right of the plaintiff to have the alienation set aside, and to obtain possession, is a mere chose in action, and not assignable."

In this the Judge is wrong, for choses in action, in this country, are assignable, and they are also assignable in England, although at law the assignee cannot sue in his own name.

The Judge proceeds:—"There is therefore no plaintiff or appellant before the Court." In that also he is wrong, for Jugmohun Lall, in consequence of his purchase, had been entered in the register (which is the record) as plaintiff in the first Court.

The Judge then says that "purchasing a suit is champerty." But every purchase of a suit is not champerty, and the Judge does not show that the facts of this case amounted to champerty. There is no foundation whatever for the law laid down by the Judge that a chose in action is not assignable, and there are many cases* in the late Sudder Court, and one in the High Court, which tend to show that champerty is not illegal in the Mofussil. In the face of those cases, the Judge ought not to have laid down the law as to champerty in the positive manner in which he did lay it down.

* Sudder Decisions for 1867, page 609.
" " " 1852 " 394.
" " " 1859 " 1310.
Marshall's Reports " 303.

In trying the case *de novo* upon the merits, the Judge may find any facts, if any exist, which justify his assertion that this was a case of champerty; so that the parties, if they please, may have the question fully considered by this Court, whether in the Mofussil a purchase amounting to champerty is illegal or not.

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CASE 1435 OF 1867.

Special Appeal from Sylhet.

Kishoree Debea and others, (Defendants) *Appellants, versus* Juggurnauth Acharjee, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Baboo Greesh Chunder Ghose for Appellants.
Baboo Tarruck Nauth Sein for Respondent.

Where plaintiff contracted to purchase an estate from defendant, certain specified plots being expressly excepted, and defendant agreeing to give other lands in lieu of such excepted plots. *Held*, that, on his failing to do so, plaintiff could sue for damages, or for specific performance, but not for possession of the plots expressly excepted as above.

The defendant in this suit is special appellant. The plaintiff contracted with defendant to purchase from him eight annas share of certain landed estates; but as regards certain lands in those estates situated within a detailed boundary, and upon which the defendant's house stood, and which were in his own nij jote, and in the occupation of his servants, it was argued that these lands should be excluded from the contract, and the defendant bound himself to make over to the plaintiff other lands in exchange for them. The plaintiff asserts that the defendant has not made over any lands in exchange under the terms of the contract, and he therefore sues to recover the lands which were exempted from the contract. The defendant answered that he had made over certain lands in exchange; but both the Lower Courts have held that this is a false allegation. In both the Lower Courts the defendant also raised the objection that, as the lands now sued for were not sold to the plaintiff, he cannot sue to recover them. This objection is again raised on special appeal. The suit is based upon the contract, and there can be no doubt that its terms are express, and exclude these lands from the plaintiff's purchase. If the defendant has broken his contract, the plaintiff may sue him, either for specific performance or for damages; but he cannot, under the contract, sue to recover the lands which he did not buy. The decision of the Lower Courts upon this point is reversed, and the plaintiff's suit to that extent dismissed.

Looking to the fact that the defendant has, in this suit, alleged that he did give the plaintiff other lands in exchange, and that this allegation has been found on trial to be false, we direct each party to pay his own costs in this litigation, except on this special appeal, in which the appellant is entitled to recover his own costs from the respondent.

CASES 117 AND 133 OF 1867.

15th February.

Regular Appeals from Hooghly.

Gopeekishen Gossain, (Plaintiff) *Appellant, versus* Mr. W. H. Ryland and others, (Defendants) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Messrs. R. V. Doyne and *M. L. Sandel* and *Baboos Kishenkishore Ghose* and *Obhoychurn Bose* for Appellant.
Mr. Kennedy and *Baboo Mohendro Lall Seal* for Respondents.

Power of Municipal Commissioners to cause ruinous buildings to be pulled down, whether they stand on a thoroughfare or not. The objection that notice of a suit against Municipal body was not given within thirty days of the obnoxious order, should be taken in Court below.

Bayley, J.—These two cases will, it is admitted by the pleaders for the parties, be governed by one and the same decision in this Court.

In the one case, Gopeekishen Gossain, a resident of Serampore, sues the Chairman and Vice-Chairman of the Municipal Commissioners of that place for Rupees 5,000 as damages for the illegal and malicious demolition of a house; and on the other, for damages for the demolition of another house, and also for the value of the materials misappropriated by them.

The plaintiff made his co-parcener in the joint property, Hemchunder Gossain, a co-defendant.

The Chairman and Vice-Chairman, defendants, rested their answer on the legality of their proceedings under Sections 64 and 65, Act III of 1864 (Bengal Council.)

The Lower Court has held that the above Section (64) "has given the determination of the question of fact as to whether such building is or is not in a ruinous state to the Commissioner, and to no one else;" and that the Lower

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Court having no jurisdiction, the case must be dismissed by it. Against this decision plaintiff appeals, urging—

First.—That there is nothing in Act III of 1864 that bars the jurisdiction of the Civil Court in suits for damages for the illegal acts of the Municipal Commissioners.

Second—That as the Section 64 is to be read as providing for the action of the Municipal Commissioners under it, only when the buildings are ruinous, likely to fall, and to be dangerous; and as these buildings were not dangerous, because they were in an open compound away from the ordinary resort of the public, the Municipal Commissioners did act illegally, and damages are therefore due.

Third.—That the law requires the materials of demolished buildings, walls, &c., to be sold and then accounted for and appropriated in a certain mode, and that in the cases before us the processes required by the law were not observed.

Before, however, the case for the appellant was opened by his Counsel, the Counsel for the opposite party took two preliminary objections.

First.—That, in one of these two cases, notice of thirty days had not been given before the plaint was filed, as required by Section 87 of Act III of 1864.

Second.—That as the plaintiff and defendant, Hemchunder Gossain, were co-parceners in these houses as their joint undivided Hindoo family property, the plaintiff could not sue alone.

The objection as to the notice having been for thirty days given before plaint, is met by the plaintiff stating that the last of the thirty days would have been one on which the Courts were shut; wherefore he was, by force of law, compelled to file his plaint the day before, so as to be in time. But, in my opinion, this objection comes too late. It was never pleaded below, and might well have been taken before the Judge as a plea in bar with reference to procedure. I would therefore overrule this plea.

I would also overrule the second objection raised to the hearing; for although the property is that of co-parceners in a joint undivided Hindoo family, the plaintiff can, in my opinion, sue for his share, whatever it may be, either as recognized amongst co-parceners or by Hindoo law. Here it is not contended that plaintiff has not a right to a moiety.

Then as to the appellant's grounds of appeal. I am of opinion that the decision of the Municipal Commissioners is, by the terms of the law, final, so long as they act within the law.

Now, it is contended that they did not act within the law, because there was no evidence of the property being in a dangerous state, and that the local position of the house in the middle of an open compound precludes danger to passengers or others, specified in the Act, and that those who came into the compound, as plaintiff's private property, were trespassers, and acted at their own risk.

The law is contained in Sections 64 and 65 of the Bengal Council Act III of 1864. The important words in this case are the following in Section 64:—

"If any house, building, or wall, or anything affixed thereon, be deemed by the Municipal Commissioners to be in a ruinous state, or likely to fall, or in any way dangerous to the inhabitants of such house or building, or to the neighbouring houses or buildings, or to the occupiers thereof, or to passengers, the Commissioners, (after certain proceedings) may cause all or so much of such house, building, or wall, or things, as they shall think necessary, to be taken down, repaired, or otherwise secured."

I see no ambiguity in these terms. Their ordinary grammatical construction therefore is to be followed. I think, in this case, that construction to be that if the Commissioners deemed the house or houses to be ruinous (which is what their notice says they did), or if they had deemed it to be likely to fall, or, irrespective of either of these, they deemed it to be in any way dangerous to passengers or others, specified, they might legally proceed under Sections 64 and 65.

Defendants having then, in my opinion, so far acted legally, I see no cause of action to plaintiff I would therefore dismiss plaintiff's appeal on this point,

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In regard to the Commissioners not having proceeded to sell before appropriating the materials, I find that, by Mr. Ryland's deposition on oath, which is not contradicted by other evidence, there was due sale of the materials, and the account sales rendered.

Under this state of facts, I would dismiss both appeals with costs.

Phear, J.—I am of opinion that, by Section 64, Act III of 1864, Bengal Council, the Municipal Commissioners, if they deem a house or building to be in a ruinous state, may, after the notice prescribed by that Section, cause the same to be taken down. The written statements of the two defendants in these actions do not, in express words, state that the Municipal Commissioners of Serampore did at any time deem the building in question to be in a ruinous state, nor is there even an allegation that the acts which are charged by the plaint against the two defendants were done by them under the directions of the Commissioners given in pursuance of such belief. But I assume, from the course which the case has taken, that both parties to the suit considered the defence to be that which such a statement and allegation would have made it. And, further, inasmuch as no issue of fact was raised in the Court below, I conclude that the plaintiff does not dispute the truth and *bona fides* of that defence. In this view of the position in which the case stands, the interpretation which I have put upon Section 64 of Act III of 1864, Bengal Council, leads me to think that the defendants are entitled to a decree in their favor on the merits. In the same view, it appears to me that the defendants having acted, as they did, *bonâ fide*, under the belief that they were exercising powers given to them by the Act, (as indeed they were, if the facts assumed are true,) were entitled strictly to one month's notice of action under Section 87 of Act III of 1864, and consequently the suit in which the period of notice was one day short ought, for that reason alone, to have been determined in favor of the defendants. I may add, however, that the objection to the sufficiency of the notice is not an objection which could be made preliminary to the hearing of the suit; for had the facts, judicially arrived at, been such as to show that the conduct of the defendants was not justified by the Act of 1864, and that their proceedings were only colourably done under cover of that Act, then they would not have been entitled to the protection of the notice at all. As to Mr. Kennedy's second objection on behalf of the defendants, I think it cannot be sustained. The plaintiff is not seeking to recover that to which he has no title, except to be joined with another; nor is he seeking to enforce an obligation existing towards himself jointly with others, and not otherwise. He is merely suing to obtain compensation in respect of a loss to himself personally caused, as he says, by reason of the defendants' wrongful destruction of property in which he had a definite share. It seems to me that such a loss would give rise to a distinct right of action in the plaintiff himself, entirely separate from all consideration of other persons.

But, for the reasons which I have already given, I think that these appeals must be dismissed, and the judgment of the Court below affirmed with costs in both cases.

CASE 787 OF 1867.
15th February.

Special Appeal from Chittagong.

Doorga Churn Paul, (Plaintiff) *Appellant, versus* Peary Mohun and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Otool Chunder Mookerjee for Appellant.
No one for Respondents.

No period shorter than twelve years can establish a right of user by prescription.

The two following points have been urged before us in this special appeal:—

First.—The length of user established by the evidence produced by the special appellant is sufficient to create a title by prescription.

Second.—That the Lower Appellate Court has misconstrued the report of the Ameen who was deputed to hold a local investigation in the cause.

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With reference to the first point, we observe that it is not necessary for us to determine in this case the precise length of user by which a title by prescription can be created. We think that any period shorter than twelve years, the ordinary period prescribed by the statute of limitations, is by no means sufficient for the purpose. The evidence produced by the special appellant does not carry his case beyond ten years, and we accordingly reject this ground of appeal.

With reference to the second point, we observe that it is incorrect. The Ameen's report in question has been properly dealt with by the Lower Appellate Court. This special appeal is accordingly rejected, but without costs, as the respondent has not appeared.

Special Appeal from Chittagong.

CASE 1166 OF 1867.

15*th February.*

Munsoor Ali, (Plaintiff) *Appellant, versus* Azmut Ali and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Gopeenath Mookerjee for Appellant.
Baboo Muttee Lall Mookerjee for Respondents.

Registered deeds belonging to a class the registration of which is optional, will take priority of unregistered deeds of the same class.

The following points have been urged before us in this special appeal:—

First.—That Futteh Ali and Azmut Ali having purchased the property in dispute under a bill of sale, which does not specify the shares to which they were respectively entitled, the presumption is that they purchased it in equal shares, and the *onus* of proving the contrary lies upon the special respondent.

Second.—That the two bills of sale propounded by the special appellant being each for a sum below Rupees 100, the Lower Appellate Court was wrong in giving priority to those propounded by the special respondent, simply on the ground that these latter were registered, whereas the former were not registered.

With reference to the first point, we observe that the question of *onus* does not fairly arise. The Lower Appellate Court has found, upon exhibits produced by the special appellant himself, that the shares of Futteh Ali and Azmut Ali were such as they were represented to be by the special respondent, and we do not see any valid reason for interfering with this finding.

With reference to the second point, we observe that the Lower Appellate Court was wrong in applying the provisions of Act XIX of 1843, the deeds in question being dated subsequent to January, 1865; or, in other words, subsequent to the period when Act XVI of 1864 came into operation. This mistake, however, does not in any way affect the soundness of the conclusion arrived at. It is true that, under the provisions of Section 16 of the latter Act, it was optional with the special appellant to register or not the bills of sale propounded by him; but Section 68 of the Act distinctly lays down that, even with regard to that class of deeds the registration of which is optional, registered deeds will be entitled to preference over unregistered ones. The practical distinction between the two classes of deeds, namely, those the registration of which is compulsory, and those the registration of which is optional, amounts to this; that the former, if unregistered, will not be received in evidence at all, but the latter will be received in evidence, notwithstanding the absence of registration, though they must give way to registered documents of subsequent dates relating to the same property. The special appeal is rejected with costs and interest thereon at twelve per cent. per annum.

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CIVIL JURISDICTION.

CASE 1086 OF 1867.

Special Appeal from Sarun.

Roop Narain Singh and others, (Plaintiffs) *Appellants, versus* Baboo Gujadhur Pershad Narain and others, (Defendants) *Respondents.*

Before *Bayley* and *Phear*, J.J.

Mr. R. T. Allan and *Baboo Poorno Chunder Shome* for Appellants.
Baboos Kishen Succa Mookerjee and *Ashootosh Chatterjee* for Respondents.

A Hindoo widow acting as guardian of a minor son, sold certain properties burdened with zuripeshgee mortgages to pay off her husband's debts. The purchasers were the zuripeshgeedars. The minor, on coming of age, disputed these sales. *Held* that the zuripeshgeedars stood in a fiduciary relation to the widow, who was also a purdanisheen, and that the onus lay therefore doubly upon them to show that the purchase-money was sufficient, and that the sums paid to them in redemption of the mortgage debt were duly calculated.

In this case two sons seek to set aside certain alienations of landed property made by their mother during their minority. The plaintiffs' claim was dismissed in both the Lower Courts, and they now appeal specially.

It appears that, on the death of the father, four mehals, which may be conveniently designated mehals A, B, C, and D, descended to his sons. Of these B, C, and D were in the hands of mortgagees under zuripeshgee leases granted by the father, while A was unincumbered. The mother took charge of and managed the property on behalf of the minors. In this state of things a suit was brought against her as representative of her deceased husband by a creditor of his, in which a decree was passed for the sum of Rupees 25,000. It is admitted by the plaintiffs' counsel that the property inherited by his clients was liable to discharge this judgment-debt. In execution of this decree, the mehal A was attached and put up for sale, but was bought in by the widow for the sum of Rupees 25,000, on the ground that this sum was much below its real value, and that consequently it would be causing a waste of the plaintiffs' property to let the mehal go at this price. She then sold mehals B, C, and D to their respective zuripeshgeedars for the three several sums of Rupees 6,000, Rupees 4,551, and Rupees 9,500, and with the margin which remained, after satisfying the zuripeshgeedars in regard to the amount due to them under their mortgages, she paid off the judgment-debt of Rupees 15,000, thus preserving mehal A untouched, and clearing off all the debts of the deceased by the sacrifice of the burdened mehals B, C, and D. It is the alienations of B, C, and D in this transaction which the plaintiffs impeach; and they contend that the facts, which have just been set out, do not establish either the actual legal necessity of the sales in question, or that the purchasers themselves, after proper enquiry, were reasonably led to believe that such necessity did exist. They therefore urge that the judgment of the Lower Appellate Court, holding that the alienee defendants had sufficiently justified their purchases, is wrong in law.

We think that, so far as concerns the necessity of a sale (of a portion at least of the property in suit), there were materials enough before the Lower Appellate Court to support the finding at which that Court arrived. But the necessity of sale does not alone dispose of the whole of the plaintiffs' cause of complaint. When a person, after attaining majority, questions, as he has a right to do, any sale of his property made by his guardian during his minority, the burden lies on the person who upholds the purchase, not only to show that, under the circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power, but, further, that the *whole* transaction, so far as regarded the purchaser's part in it, was *bonâ fide*. In cases where the guardian is himself under no personal disqualification, and a purchaser is a stranger to the property, probably these *bonâ fides* should, in the absence of evidence to the contrary, be presumed as soon as the legal propriety of a sale is made out. But it is otherwise when either the person who sells labours under disqualification, or the purchaser stands in a fiduciary relation to the owner of the property. In the case before us both these contingencies occur. The guardian and vendor was a purdah lady, and the purchaser was a zuripeshgeedar bound to account strictly to the owner for the rents and profits of the land which was sold. The principle that, in the class of cases last mentioned, the purchaser must make out the *bona fides* of his dealing, has been distinctly laid down by this Court

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in the case of Kanye Lall Juhoree *vs.* Kameenee Debee, reported in the *Englishman* newspaper of March 28th, 1867, where it was said:—"A Hindoo purdah woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant, and infirm, and to those who, for any other reason, are especially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted, unless the contrary be shown. It is therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transaction to show that its terms are fair and equitable. The most usual mode of discharging this *onus* is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party" The Court quoted various English authorities in support of the position which it thus took up It then went on to add:—"Further, for the like reason, the same burthen of proof lies on any one who stands before the Court in reliance upon a contract made with any one, whether purdah-nusheen or other, towards whom he is in any fiduciary position, relating to the subject of contract" Here, in the case before us, the defendants or their predecessors in title, dealt, in regard to the purchase of the mehals which are the subject of suit, with a purdah-nusheen; and they also at the same time stood in the position of accounting parties to the person whom that lady represented, relative to the rents and profits derived by them from the same mehals. They are therefore, for double reasons, under the obligation to show that their respective purchase-transactions were fair and equitable. It seems to us that this, under the circumstances which attend the present action, involves the making out that the zuripeshgeedar-purchasers gave reasonably sufficient consideration for the mehals which they respectively bought, and which are now sought to be recovered. Only part of the consideration-money passed into the hands of the guardian; the remainder came back to the purchasers themselves to recover the debt said to have been due to them in respect to the zuripeshgee loans. The defendants therefore, in order to enable the Court to get at what was the actual amount of the purchase-money, must make out what was properly due under this head at the time of the sale; and this can only be done by production of proof of the zuripeshgeedar's accounts for the time of their usufructuary possession; for if the rents and profits then received more than covered the amount of interest payable, the balance would be applicable to reduction of the capital debt. No attempt has been made by the defendants to render an account of any sort, and therefore they have not discharged the burden which lies upon them to establish the honest dealing of the purchasers in the sale, which the plaintiffs impeach. They cannot rightly complain of the hardship of this burden, for all purchasers of property belonging to a minor, or from a person under disability, and, in particular, persons in fiduciary situations purchasing the property of those whose trustees they are, must know at the time of purchase that they will be obliged by law to defend their acts, whenever the purchases may be afterwards questioned by those entitled to do so; and it is therefore their own fault if they do not take care to preserve the requisite evidence for the purpose.

In the absence of the evidence which we have just referred to as necessary to the defendant's case, inasmuch as the burden of proof on this point is upon them, we ought to decree the plaintiffs' suit at once. But we think that the ends of justice will be better served by remanding the case to the Lower Appellate Court to try whether the purchases of the three mehals, which are sought to be set aside by the plaintiffs, or any of them, were fair and equitable, and, in particular, to take accounts of the receipts and profits of the respective zuripeshgeedars from the said mehals during the time they had possession of them under the zuripeshgee leases. If the amount of these receipts and profits, in reference to each zuripeshgee lease, should prove to have exceeded the total amount of interest due thereunder, then the excess should be applied to

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the reduction of the capital debt, and therefore, to a like extent, the consideration-money paid should be taken to be diminished. The case is remanded accordingly.

CASE 153 OF 1 67.

24th February.

Regular Appeal from Tipperah.

Mussamut Roop Moonjury Kooree, (Defendant) *Appellant, versus* Beerchunder Joobraj, (Plaintiff) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Baboos Kalee Mohun Doss and *Chunder Kallee Ghose* for Appellant.
Baboo Onoocool Chunder Mookerjee for Respondent.

A mokurreree grant made by the Tipperah Raja to any member of his family is voidable by his successor in the Raj.

Bayley, J.—Plaintiff in this case sues to resume and obtain possession of a certain tenure which defendant alleges is held on a mokurreree pottah given by the plaintiff's predecessor, and not liable to be resumed.

Plaintiff rests his case on the allegation that, by the custom of the family (that of the Rajah of Tipperah), it is provided that any grant of this nature made to a member of the Rajah's family is resumable on the death of the grantor. Plaintiff relies on a decision of the Sudder Dewanny Adawlut, Select Reports, Volume VI, page 270, Huree Mala's case, 28th March, 1837, to prove the custom.

Defendant's case, on the other hand, is that the Sudder Dewanny Adawlut decision, 28th March, 1857, page 1375, distinctly rules that the custom restricting such grants to the life of the grantor is one wich exists only as regards those who are members of the family of the Rajah of Tipperah; and that this defendant having married into another race (Gottro), was no longer a member of the family of the Rajah of Tipperah; and that consequently the pottah, which is otherwise admitted to be of the character of a valid mokurreree not resumable, is good as respects the defendant, who, by having ceased to be a member of the family, ceased to be affected by the custom on which plaintiff based his claim.

The Lower Court gave plaintiff a decree. Defendant appeals.

After fully hearing the evidence and the arguments of counsel on the case, I am of opinion that the case of Hurry Mala cited above, and that of the late Sudder Dewanny Adawlut of 1857 read together, rule that the power of resumption of such a mokurreree tenure as that now in suit exists only as against those who are members of the family.

But, at the same time, it is not shown to us that, by any recognised rule of Hindoo law, such a lease as this, made after marriage, is one which by marriage ceases to be a gift to a member of the Tipperah Rajah's family, *i. e.*, of that character to which the custom allowing resumption by a successor to the Raj would not apply.

There is, further, no question that the substantial contention of defendant is not that there is no such custom, but that the custom only applies to members of the family, and that the grantee ceases by marriage to be a member of the family, and the grant consequently not liable to resumption.

In this view, I would affirm the decision of the Court below, and dismiss this appeal with costs.

Phear, J.—On the whole, I am of opinion that the defendant in her written statement has admitted that all grants of such a nature as that of the grant which is sought to be resumed, when made by the Rajah of Tipperah to a member of his family, are, by recognized custom, voidable by his successor; that, in fact, the grantee takes subject to this condition. I also think that, in the absence of any evidence to show that "member of the family," in the wording of this admitted custom, bears any meaning more restricted than that which this phrase usually bears, a daughter of the Rajah, whether married or not, comes within it. I therefore concur in the judgment of Mr. Justice Bayley.

Special Appeal from Maunbhoom.

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25th February.
CIVIL JURISDICTION.
CASE 1164 OF 1867.

Kenaram Chuckerbutty, (Defendant) *Appellant, versus* Dinonath Pandah, (Plaintiff) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Mr M. L. Sandel and *Baboo Onoocool Chunder Mookerjee* for Appellant.
Baboo Taruckna'h Sein for Respondent.

A Court can only give a declaratory decree as to a right when an actual invasion of such right has taken place prior to suit.

Bayley, J.—The special appellant urges two objections before us:—
First—That there is no cause of action shown in plaintiff's plaint.
Second.—That the *onus* has been improperly put on the defendant.

In the first point, we thought it proper to give permission to the pleader to argue it, although it is not taken in the written grounds of special appeal. He cites to us certain cases referred to in Broughton, 2nd Edition, in the notes to Section 15, Act VIII of 1859, and to Wyman's Reporter, Volume IV, 20th June, 1867, page 60

On this first point, I am of opinion that the objection is good. The plaint states no overt act of hostility or attempt to take adverse possession from plaintiff. It is not asserted that there is anything, except some vague feeling of injury to plaintiff's right from defendant having caused a certain demarcation to be made by the Survey Officers. To those officers, plaintiff, with full notice of the survey proceedings in the mehal, never preferred any objections at the time; and, in fact, the defendant only did what the law required him to do, *viz.*, be present and point out the lands and estates to the survey officers. Plaintiff does not show that he has lost, or is about to lose, anything he had. The case, page 300, Sudder Dewanny Adawlut Reports, 1857, 28th February, cited by plaintiff's pleader, is really in support of the defendant's objection.

On the second point, I am clearly of opinion that the Lower Appellate Court substantially found it as a fact, established by plaintiff's witnesses, and not rebutted by defendant, that plaintiff had a title to the lands in suit But as the first point carries a verdict in favor of defendant, special appellant, it is needless to proceed further. I would decree the special appeal, but, under the circumstances, each party should pay his own costs.

Phear, J.—I concur in Mr. Justice Bayley's decision, and I only wish to add that I adhere to the opinion relative to the proper construction of Section 15 of Act VIII of 1859, which I have more than once elsewhere expressed, and which is reported in Cazee Muzhur Hossein *vs.* Denobundhoo Sein, and others, Bourke, page 8; Promotho Nath Ghose *vs.* Jadoonath Sein; 1 Indian Jurist, N. S., page 293; and other places. It seems to me that this Section gives the Court power to make a mere declaration of right without more, only in those cases where the facts proved before it are such that it would have been able to give consequential relief, had the plaintiff asked for it, and the Court seen fit to grant his prayer. In other words, the plaintiff, in order to entitle himself to a bare declaration of right under this Section, must make out, to the satisfaction of the Court, some act done by the defendants which is hostile to and invades that right, and which would justify an injunction, or a decree for damages or a decree for delivery of possession being passed against the defendant, if the Court had so thought fit to exercise its discretion. In this case it does not appear that the defendant has done anything whatever which can give the plaintiff a cause of action against him. No doubt, when challenged by the plaint, he is ready to deny the plaintiff's claim. But this denial, by itself, does not give the plaintiff a right of suit if he had it not before, although, of course, it may afford some evidence of its existence.

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CASE 1183 OF 1867.

Special Appeal from Shahabad.

Rampershad Ojha and others, (Plaintiffs), *Appellants, versus* Bhurosa Koonwar and others, (Defendants) *Respondents.*

Before *Loch* and *Hobhouse*, J. J.

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellants.
Baboos Chunder Madhub Ghose, Hem Chunder Bannerjee, and *Nilmonee Sein* for Respondents.

Where a special appellant, on the case being called up for hearing, intimates that he withdraws his appeal, and the Court allows this, the respondent cannot be heard upon any petition of cross-objection filed by him.

On this appeal being called up, the special appellant stated that he wished to withdraw the appeal. The respondent then informed the Court that he had filed a petition under the provisions of Section 348 of Act VIII of 1859, and wished the case to go on in regard to his appeal.

After hearing argument, and considering the terms of Section 348 of the Code of Civil Procedure, we think the respondent is not entitled to be heard, as the special appeal is not before the Court. Looking at the law, we think the only construction that the words "upon the hearing of the appeal" will bear, is that the appellant must have opened his case, and by so doing asked the Court to give him some relief. It is then, and then only, that this hearing commences. The mere calling up a case to be heard does not, as contended by the respondent, mean the same thing as the hearing of the case. The intention of the law evidently was that, when the case was being heard, or, as expressed in the law, upon the hearing of the case, the respondent might take any objection to the decision of the Lower Court, &c. It has been urged that an appellant cannot withdraw an appeal; that while the law provides for the withdrawal of suits, it nowhere provides for the withdrawal of appeals. We think this argument is untenable. The Appellate Court has, under Section 37, Act XXIII of 1861, all the powers vested in the Courts of Original Jurisdiction; and if the latter can permit a suit to be withdrawn, the former has authority to allow an appeal to be withdrawn.

The special appeal is allowed to be withdrawn, but the respondent will get his costs.

CASE 518 OF 1867.

27th February.

Miscellaneous Appeal from Hooghly.

Obhoy Churn Dutt, (Judgment-debtor) *Appellant, versus* Mudhoosoodun Chowdhry, (Decree-holder) *Respondent.*

Before *Loch* and *Hobhouse*, J. J.

Baboo Tarruck Nath Sein for Appellant.
Baboos Aushootosh Dhur and *Tarruck Nath Dutt* for Respondent.

A notice under Section 216, Act VIII, to the judgment-debtor, under an *ex-parte* decree, to show cause why the decree should not be executed against him, is sufficient notice to him of the existence of such decree. He must apply for retrial within thirty days of the service of such notice.

The case was remanded by the High Court on the appeal of the present special appellant, with direction to the Lower Court to determine two points: *first*, whether the petitioner was entitled to a rehearing of his case under Section 119; and, *second*, should this point be given against him, the Court should determine from evidence whether the notice alleged to have been issued after execution was applied for in October, 1863, was served according to law.

The respondent purchased a decree obtained by Mr. Runssy against the special appellant on 28th March, 1862, and had his name substituted in September, 1863. On 17th September, 1863, he applied for the service of notice under Section 216, and the report of the Nazir, dated 9th October, 1863, shows that it was served. On 17th February, 1864, the decree-holder was directed to proceed with the execution of his decree; and failing to take any steps, it was struck off on 28th April, 1864. The present application was made on 12th December, 1865; and on the issue of notice, the debtor appeared and urged that no notice had been served upon him before the *ex-parte* decree was obtained, and he therefore prayed that the case might, under the provisions of Section 119, be admitted to a rehearing; and he further denied that any steps to execute the decree had been taken till the present proceedings in

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execution were issued; and having made this application for a rehearing of the case within thirty days after process for enforcing judgment had been taken, he was entitled to have it admitted.

On remand, the Courts below have found that the notice under Section 216, returned by the Nazir on 9th October, 1863, was duly served; that there was no ground for discrediting the witnesses on this point; and as no application for rehearing had been made till 1866, the applicant was clearly out of Court.

It is now contended before us that a notice under Section 216 is not a process to enforce judgment as contemplated in Section 119. The words of the law are—"the defendant may apply, within a reasonable time, not exceeding thirty days, after any process for enforcing the judgment has been executed." By the Full Bench Ruling of 11th September, 1866, II, Wyman's Reporter, page 277, it was held that the issue of a notice by the Court under Section 216 was a proceeding within the meaning of Section XX, Act XIV of 1859, to enforce, or to keep in force, a decree; and the Full Bench Ruling of 3rd February, 1868, quoted by special appellant in support of his plea, is not in any way opposed to the view taken by the Court in its previous ruling. In the latter judgment the Court held that process of attachment, and not actual sale of the debtor's property, was a process in execution, and the period of thirty days would begin to count from the date of attachment, and the rule laid down by the Court was—"that as soon as execution of some process or writ against the defendant has apprized him of the fact of the decision, he is bound thereupon to apply to the Court within fifteen days (in Act X suits, and thirty days in suits before the Civil Courts) for a new trial." Now, the notice under Section 216, calling upon the debtor to show cause why the decree should not be executed against him, gave him simple notice of the fact of a judgment existing against him, which was about to be enforced; and we think he was bound to have applied for a new trial within thirty days from the service of such notice, and that he cannot excuse his neglect in not so applying by pleading that no writ was issued for the attachment of his property or person. We concur therefore with the Judge that special appellant is not entitled to a new trial.

The plea of limitation is urged against the execution of this decree; but as the proceedings taken in 1863 have been held to be *bona fide*, and the present application is within three years from that time, this plea must also be rejected. The appeal is dismissed with costs. The same order is applicable to appeal No. 503.

Special Appeal from Dacca.

CASE 1615 OF 1867.

29th February.

Kalee Kishen Pal Chowdhry, (Plaintiff) *Appellant, versus* Mussamut Juggut Tarra and others, (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Baboos Romesh Chunder Mitter and *Bamachurn Bannerjee* for Appellant.
Baboos Kallee Mohun Dass and *Kalee Kishen Sein* for Respondents.

In a suit to recover sums overdrawn by an agent after deducting salary due, the limitation will run from the date of that overdrawing of each item, in the absence of any special contract to the contrary.

The plaintiff sues to recover the aggregate amount of certain sums of money from time to time taken by his gomasta from the year 1265 to the date of his death, deducting therefrom the total amount of salary due to the gomasta. The defendants are the heirs of the gomasta.

The fact of the money being taken, and of the salary being due, has been found by the Lower Appellate Court. But it is said that the Lower Appellate Court has erroneously applied limitation to the sums taken by the gomasta in the years 1265 and 1266. That Court has held that whatever was due at the end of the year 1266 is barred, and must be deducted from the claim. The plaintiff contended that that sum is not barred, as the salaries for the following years should have been set-off against that sum.

It appears to me that this Court should not in any way favor the plea of

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limitation. When the law applies, it must have its course; but if, upon the ordinary system of taking accounts between master and servant, the salary of each year as it fell due would have been set-off against the sums appropriated by the gomasta, it would be more consonant with equity to adopt that course of account, than to hold that the salary of each year was to be set-off only against the debt of each year, and thus allow a large portion of the debt to be barred from recovery. There does not appear to have been any misappropriation. The gomasta was allowed from time to time to take whatever sums of money he required from the treasury of his master. These had to be repaid; and it seems to be admitted that the first item from which the master would repay himself was the servant's salary; it seems to me that there was, in fact, a running account between the master and servant; and that if the servant had overdrawn what was due for his salary in the year 1266, the sum which was due for his salary at the end of 1267 would be credited at the end of that year against what had been overdrawn at the end of 1266; and if a balance still remained, that the amount due for the salary of the year 1268 would, at the end of the year 1268, be credited against that balance; and similarly, if a balance still remained, the salary for the year 1269 would, at the end of that year, be also credited against that balance, and similar credits of salary due at the end of each year, or whenever the salary fell due, would continue to be made against the oldest standing debt. If this is the correct view of the law, the manner in which the Lower Appellate Court has taken the accounts is erroneous. The principle in law upon which, I think, this is the correct mode of taking the accounts is the right of the creditor to appropriate sums, however paid, in reduction of debt to whatever portion of the debt he pleases, so long as the debtor does not distinctly state that the sums so paid are paid against a particular debt. I would reverse the Judge's decision, and on the account, as I hold it should be taken, would find that no portion of the gomasta's debt is barred by limitation, and therefore I would decree the plaintiff's claim with all costs.

As there is a difference of opinion on the law, the opinion of Mr. Justice Kemp will prevail, and this appeal will be dismissed with costs.

Kemp, J.—I cannot concur in the judgment of my learned colleague. I would confirm the decision of the Lower Appellate Court, which, I may observe, confirms that of the Court of first instance.

The view taken by Mr. E. Jackson of the application of the statute of limitation to the facts of this case as admitted between the parties, or substantiated by reliable evidence, is wholly different from the plea raised by the plaintiff, special appellant, in the Lower Appellate Court.

I proceed to state briefly the nature of the suit as gathered from the pleadings, which I have translated from the original vernacular.

The plaintiff is a mahajun. He sues the heirs of a deceased gomasta, by name Muthooranath Paul, on the allegation that the said gomasta overdrew from the funds of three guddees under his charge, at various dates, from the year of his appointment in 1265 to the date of his death in 1269, an aggregate sum of Rs. 1,645, omitting fractions. From this sum, the plaintiff gives credit on account of salary, during the whole period of the deceased gomasta's incumbency, Rs. 560, and his claim is for the balance, or Rs. 1,085, the date of institution of suit being 17th Choit, 1272, B. S.

In his plaint, the plaintiff states that as there was no stipulated term within which the sums so overdrawn were to be repaid, his cause of action for the whole sum so overdrawn, which ranges over five years, arose on the day after the death of the gomasta, or on the 25th Bysack, 1270.

Both the Lower Courts have held that Clause 16, Section 1, Act XIV of 1859, applies to this suit, and that on the date of institution of suit, *i. e.*, the 17th Choyt, 1272, B. S., the moneys overdrawn in 1265 and 1266 were barred by lapse of time. A decree was given in part of the sum claimed, or for sums overdrawn in the years 1267, 1268, and 1269, after deducting the salary due to the late gomasta for those three years up to date of death.

In appeal to the Judge, the plaintiff, special appellant, appealed on one ground alone, which I translated from his petition of appeal in the vernacular, *viz.*, "It is not customary to recover in cash sums overdrawn by a gomasta as long as he is in the service. Muthooranath Pal was in service up to date of his death; *ergo*, my cause of action arose from the date of his death. The Principal Sudder Ameen has overlooked this, and has calculated the period from which limitation runs from the date of each item overdrawn."

Before us, the pleader of the special appellant abandons this plea altogther, and raises an entirely new one, which has found favor with my learned colleague.

I am clearly of opinion that, as there was no stipulation between the parties that the salary of the deceased gomasta was to be set-off at all against the items overdrawn by him, much less that the salary due for the whole period of his service was to be set-off against the oldest claim in point of date on account of sums overdrawn by him, so as to evade the statute of limitations, the concurrent opinion of the Lower Courts, which is based upon the pleadings and allegations before them, is the correct one. I would dismiss this appeal with costs and interest.

Miscellaneous Appeal from Rajshahye.

CASE 461 OF 1867.

3rd March.

Puromasoondurree Dassee, *Appellant, versus* Tarrasoonduree Dassee, *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Nilmonee Sein for Appellant.
Baboo Nilmadhub Sein for Respondent.

No limitation to bar application for a certificate of administration. The certificate must be given to the person appointed by genuine will to the charge of a minor's property. No person claiming rights in the property adverse to the minor can oppose the grant of the certificate.

This is an appeal against an order of the Zillah Judge of Rajshahye refusing to grant a certificate of administration to the appellants under the provisions of Act XL of 1858. The appellant's claim to the certificate in question was based upon a will alleged to have been executed in favor of the minor by his grandmother. The respondent came forward as an objector, urging that the properties covered by the will did not belong to the testatrix; that she, the respondent, had purchased half of those properties from the father of the minor, who was the real owner thereof; and that the will itself was a spurious document. It is contended before us by the appellants that the reasons assigned by the Judge in support of his refusal to enquire into the genuineness or otherwise of the will propounded by them are bad in law. We think that this contention is sound. The mere fact that the application for the certificate was not made until after the lapse of six years from the death of the testatrix, is not a sufficient ground for refusing to enquire into the merits of that application. Act XL of 1858 does not provide for any limitation as to the time within which applications for certificates under that Act are to be made; and were it otherwise, the interests of minors would have been seriously affected by the negligence of those who are entitled to represent them. Nor is the Judge right in holding that he was not competent to enquire into the claim of the appellants to obtain the certificate when the "natural guardian" of the minor, *viz.*, his father, was alive. If the will propounded by the appellants is a genuine document, the certificate prayed for must be granted to them, notwithstanding the existence of any "natural guardian." The words of Section 7 of the Act are positive on this point. That Section says:—"If it shall appear that any person claiming a right to have charge of the property of a minor, is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person." The words clearly show that there is no discretion left to the Court in cases in which there is a testamentary appointment duly proved, provided the person appointed to the trust is willing to undertake it. The last reason assigned by the Judge in support of his decision is equally

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untenable. He says that he could not enquire into the genuineness of the will, or into the power of the alleged testatrix to make it, without trenching upon the jurisdiction of the ordinary Civil Courts! The Judge was fully competent to enquire into the genuineness of the will, because the Legislature has given him full powers to do so. As to any questions regarding the right of the testatrix to make the will, or regarding her title to the properties covered by it, we are of opinion that those questions need not be enquired into on an occasion like this, and the Judge's error on this point appears to have arisen from a total misconception of the position of the respondent by whom they were raised. The respondent does not claim the certificate in her own behalf, nor does she appear as a friend or well-wisher of the minor, and therefore interested in seeing that an improper person is not selected to administer the trust. She claims certain rights adversely to the minor, and all questions upon which the determination of those rights depends must necessarily be reserved for adjudication in a regular suit. We think that, looking to the nature of the objections urged by her, she ought not to have been admitted as a party to this record. Her rights, whatever they are, cannot be in any manner prejudiced by any adjudication which the Court might make upon the right of the appellants to obtain the certificate in question; and it appears to us, therefore, that any interference on her part on the present occasion was altogether uncalled for. Suppose that the interests of the minor require that an action should be instituted against her for the properties she claims to hold by right of her purchase from the father of the minor; suppose also that there are no such special circumstances as would induce the Court to allow any relative of the minor to institute such an action without obtaining a certificate, as required by Section 3 of the Act,—can the respondent be permitted to come forward and say that no such certificate ought to be granted, inasmuch as the properties, with reference to which the intended suit is to be brought, do not belong to the minor, but to herself? We think that, to allow her to intervene in such a manner, and with such objections, would be to defeat one of the very objects for which a certificate under Act XL of 1858 is necessary. For the foregoing reasons we reverse the decision of the Judge, and remand the case to him for a fresh trial. The Judge will give to the appellants a reasonable opportunity to produce all their evidence, oral and documentary, and then dispose of the case according as he may find the will relied upon by them to be a genuine or a spurious document. The name of the respondent shall be struck off the record, and she shall have to pay to the appellants all the costs incurred by them, down to the present moment, both here and in the Court below.

Special Appeal from Moorshedabad.

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CIVIL JURISDICTION.
RENT SUITS.

CASE 76 OF 1867.

Poolleen Beharee Sein, (Defendant) *Appellant, versus* Messrs. R. Watson and Co., (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Bayley*, *Seton-Karr*, *Phear*, and *Macpherson*, J. J.

Baboos Kallee Kishen Sein and *Romanauth Bose* for Appellant.
Messrs. R. T. Allan and *J. S. Rochfort* for Respondents.

This case was referred to the Full Bench on the 25th April, 1867, *under the following orders recorded by Bayley and Shumboo Nauth Pundit,* J. J.

Shumboo Nauth Pundit, J.—This is a case for enhancement. Plaintiff sued on the ground of increase in the productive powers of the land and excess of area, and increase of value of the produce. On the two latter points there was a remand; but this special appeal is on the first point.

The special appellant, defendant, having admitted the increase in productiveness, he, defendant, was called upon to show that it had so increased by his agency, or at his expense, and the defendant's proof on this point being considered insufficient, a decree was given to the plaintiff, declaring him entitled to enhance.

This view is in accordance with a decision of this Court, reported in page 24 of Volume I of Weekly Reporter, 18th August, 1864.

We, however, are not inclined to agree in this view. We hold the landlord has to prove that he is entitled to enhance, on the ground or grounds for enhancement enumerated in Section 17 of Act X of 1859, and mentioned in the notice served by him. Ground No. 2 is increase in production otherwise than by the agency or at the expense of the ryot, and the landlord could not be entitled to enhance by proving simply an increase in production. What the landlord will have to prove is not a negative, but an affirmative, showing the cause of the increase, and further proving that the same is unconnected with the agency or the expense of the ryot. Upon this view, the case reported in page 155 of the same volume appears to have been decided. The admission or denial by the ryot of the fact of increase does not make any difference. Bare increase will not entitle a zemindar to enhance. If he had been entitled to enhance only on that proof, unless the ryot succeed in proving that it is, however, at his expense and by his agency, then the plea of the ryot that the increase is owing to him, and to his expense, may be a special plea by him, and which he must then have to prove.

The law would have been differently worded if such a thing was intended.

Plaintiff cannot say that he cannot know the facts which he is required by us to prove, because it is on the allegation of such facts having taken place that plaintiff, under Section 17, acquires any right to serve notice to demand enhanced rents.

The two decisions appear to be inconsistent with each other. Although the Lower Appellate Court does not appear to have decided against the defendant solely upon this question of *onus*, still this question must be settled before we can proceed further.

On the *onus* being thrown upon the plaintiff, he may perhaps have it within his power to prove additional facts which are not now before us, and which may bear upon the present subject.

If the defendant, special appellant, has to prove a plea which, we think, is not a special plea of his, but a denial of the allegations of the plaintiff, it is to be decided whether the facts proved in this case are legally sufficient to exempt the ryot under cover of the words "agency and expense."

We therefore refer this case to the Full Bench to know on whom the *onus* to prove the agency of, and expense by the ryot, lies in such a case; and also to try if the *onus* is upon the defendant, whether the facts found are legally sufficient to exempt the ryot.

Full Bench may decide only the abstract point of law, and remand the case to us, or try the whole case just as it may suit that Bench.

When a landlord claims enhanced rent, on the ground that the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot, he must prove his whole allegation, even though this appear to involve the proof of a negative. It is not enough for him to prove merely increased productiveness, and call on the ryot to prove that this is the effect of his labor or expenditure.

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Bayley, J.—I have no doubts as to which is the correct ruling on this point, whether the *onus* is on plaintiff as of one continuous allegation, *viz.*, that "the land is liable to enhancement because of increase of productiveness, not the result of the ryot's agency;" or whether the plaintiff's allegation may be confined to this, *viz.*, "that there is such increase, and on that being admitted or proved, defendant must show his special exemption, because that increase is the result of his own agency." The first affirmative allegation is that there is an increase entitling to enhancement; but is it sufficient, when proved, to obtain a decree, if proof be not also given by plaintiff that it is an increase, not the result of the ryot's agency? The wording of Section 17 leaves this in doubt, and the point had better be decided by a Full Bench.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J., *(Bayley and Macpherson, J. J., concurring)*.—The question which is submitted for the opinion of this Bench is whether, when a landlord sues for enhancement, on the ground that the productiveness of the land had increased, the *onus* is on the plaintiff to prove that the productiveness was increased otherwise than by the agency or at the expense of the ryot, or on the defendant to prove that the productiveness was the result of his agency, or to show what was the cause of it.

Mr. Rochfort has contended that it would be sufficient for the plaintiff to allege that there had been an increase in productiveness. But that, I apprehend, would not be a sufficient ground for enhancement. The title of the plaintiff to enhance depends upon the fact that the productiveness has increased otherwise than by the agency or at the expense of the ryot.

We cannot suppose that Messrs. Watson & Co. gave notice that they intended to enhance the rent, or came into Court to enforce their power to enhance, and made a declaration that the statement in their plaint was correct, that the productiveness had increased otherwise than by the agency of the ryot, without knowing the facts upon which they grounded their notice, their assertion in the plaint, and their verification of it. If they did so, they did that which they ought not to have done, and therefore we must suppose that, when they gave a notice to enhance, and claimed the enhancement by their plaint, they knew upon what ground they allege that the productiveness had increased otherwise than by the agency of the ryot.

Mr. Rochfort also referred to the defendant's statement as to what he called a confession and avoidance. What a defendant says, either orally or by a written statement, is not a plea in confession and avoidance.

I asked Mr. Allan whether there was a written statement put in, or whether what the defendant stated was stated verbally in Court. But I do not think it makes any difference in point of law whether the statement is made by defendant verbally or in writing.

Suppose a defendant comes into Court, and the Court asks him:—"What do you say to the plaintiffs' claim?" and he says—"I admit the productiveness has increased, but not otherwise than by my agency." Such an admission must be taken altogether. So it is in the case of a written statement. A written statement put in by a defendant is not a plea by way of confession and avoidance; it is a statement of the grounds of his defence, and he must verify the statement. It is like an answer in Chancery. If you read a man's answer, you must take the whole admission together. Taking the whole admission together in this case, the defendant says that "the productiveness has increased, but not otherwise than by my agency;" and the plaintiff then has to prove his case.

The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove the title.

That was laid down by the Privy Council in the case (Khaja Mahomed Gowhur Ali Khan *vs.* Ashrufoonissa) reported in II Weekly Reporter, Privy Council Rulings, page 13. They say that the plaintiffs "have not only to prove their relationship, which is not disputed, but their heirship, which

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depends upon the illegitimacy of the appellant; and they must give sufficient general evidence to throw upon him the *onus* of proving his legitimacy."

In Starkie, the rule is thus laid down at page 588 :— " It is to be carefully remarked that, although, as a general rule, the law neither presumes liability or discharge from liability, nor any fact or state of things essential to such liability or discharge not established by competent means, the law does not, in the absence of proof of a negative, where it is material to a right, assume the affirmative to be true; it is, on the contrary, frequently essential to the establishment of right to prove the negative of facts."

The plaintiff alleged the right to enhance, on the ground that the productiveness had increased otherwise than by the agency of the ryot.

I am of opinion, therefore, that the *onus* lay on the plaintiff to prove the ground of his right to enhance, namely, that the productiveness of the land had increased otherwise than by the agency of the ryot.

The case will be remanded to be determined upon the evidence as it stands. The appellant will have the costs of this appeal.

We see that the suit was brought in the name of Messrs. R. Watson and Co. This Court has determined, in a case in which Messrs. Watson and Co. were parties, that the names of the persons composing the firm must be given in the same manner as every firm is bound to give the names of its members. In future the Judges are not to receive plaints at the suit of Messrs. Watson and Co. or any other firm, but should in all cases require the names of the parties constituting the firm to be stated.

Seton-Karr, J.—I am of the same opinion.

Two main points were urged on behalf of the zemindar with the view of casting the *onus* on the ryot.

Mr. Rochfort's argument was that, when the fact of a positive increase was either admitted or proved, this fact alone would entitle the zemindar to the benefits of the increase, unless the defendant could prove the special plea of avoidance. But this argument, though at first sight it may appear to deserve some consideration, seems to me to have been completely disposed of by the remarks of the learned Chief Justice, to the effect that, if you take the admission of a defendant at all, you are bound to take it altogether, and to its whole extent.

The other main argument was dwelt upon by Mr. Allan, to the effect that, in this case, the *onus* ought to be shifted according as the means or facility of proof resides with one party or the other; and that in suits for enhancement it is much more easy for the ryot to prove the special circumstances under which either the value of the produce or the productive powers of the land have increased, than it would be for the zemindar; that it is fairer, in short, to require the ryot to prove his case with regard to his particular plots which he is necessarily familiar with from constant supervision and inspection, than to require the zemindar to prove his case with regard to the lands of scores of ryots scattered probably over several villages, of which he or his agent can have but a partial knowledge. But there is nothing unreasonable in requiring the zemindar to prove his case. He has his gomasta or his local agents. He can call the defendant himself into Court and examine him, and he can summon other ryots to prove facts which must be widely known; and he ought to have no difficulty in proving that the increase has resulted from additional productiveness in the soil, arising out of fertilising deposits, or from increased facilities for disposing of the produce arising out of the construction of protecting embankments, or the introduction of railways, or the rise of new markets, or the generally increased facilities of communication which are caused by the construction of ordinary metalled road. Consequently, there is nothing which, in my opinion, should exempt the zemindar in this case from the ordinary liability which attaches to all plaintiffs.

The case reported at page 24, Volume I, Weekly Reporter, was never properly argued. No one appeared for the respondents; and it appears to have

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been assumed that, on the mere fact of increase being proved or admitted, the *onus* was necessarily shifted to the shoulders of the ryots.

The two other cases, as far as the facts can be gathered from the reports, appear to me to favor the contention of the appellant in this case. But on general grounds, and looking to the purely legal question of the *onus* of proof, I am quite prepared to hold that in such a case it is justly laid on the party seeking to enhance.

Phear, J.—This is a suit to recover rent at an enhanced rate. The party claiming this must have given notice, under Section 13, Act X of 1859, of his intention to claim an enhanced rent, and the ground upon which that claim is based; and, under Section 17, if the claim be made upon the ground of increase of the productive powers of the land, or of the value of the produce, it must include this further condition also, namely, that these have been increased otherwise than by the agency or at the expense of the ryot. Consequently, it is the basis of the plaintiff's claim in this suit that either the value of the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot.

It is admitted by the plaintiff's counsel that, ordinarily, the rule of law is that the plaintiff must prove that which is the foundation of his right. But it is said that, in this particular case, the burden of proof is shifted from the plaintiff to the defendant for this single reason, that it is easier for the ryot to prove his exception, than it is for the plaintiff to prove that the exception does not exist. To me it is somewhat novel to hear this enunciated as a rule of law, although I am familiar with the phrase that where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit, the burden of proof must be there also. But that has a special meaning, and applies to a very limited class of cases, the class of cases to which I alluded during the argument. I do not know if any of that kind is to be found in this country, because they entirely depend upon the provisions of statute law. But the principle does not go further than those peculiar cases. Mr. Baron Alderson, in Elkin *vs.* Janom, 13 M. and W., 662, even qualified its applicability in regard to these; and it appears by the quotation which I made from a judgment delivered by Lord Denman in Doe *versus* Whitehead, 8 Adolphus and Ellis, page 571, that, according to English rules, the place of the knowledge does not affect the situation of the burden of proof. His words are:—"The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law."

I have thought it necessary to make these remarks, although I fully concur in the judgment which has been delivered by my lord, for the reason that this is not the first time I have heard that principle attempted to be used which Mr. Allan has endeavoured to use to-day, and therefore I think it desirable to say, as far as I am concerned, that it appears to me an erroneous application, if it has been here attempted to be made.

For these reasons I concur entirely with the Chief Justice that this is a case in which the plaintiff is bound to prove not only that the value of the produce and the productive powers of the land have been increased, but also to go further and prove what is termed a negative, namely, that they have increased otherwise than in consequence of the exertion of the ryot himself.

CASE 207 OF 1867.
6th February.

Regular Appeal from Purneah,

Rajab Enyat Hossein, (Plaintiff) *Appellant, versus* Mussamut Bebee Khoobunnissa, (Defendant) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

The Advocate General and *Messrs. R. T. Allan* and *R. E. Twidale* for Appellant.
Mr. C. Gregory for Respondent.

Procedure under Act X differing from

This is a suit to recover arrears of rent at the rate of Rs. 5,450-12 per annum for the years 1272, 1273, and 1274, on a putnee lease taken by the

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that under Act VIII of 1859. Under Act X the Collector cannot direct that the first hearing shall be final, or only for the fixing of issues. The parties are not bound to produce any witnesses at all on the first day of hearing.

defendant at that rate. The plaintiff states that he had, on an allegation made by the defendant that a dacoity had taken place in her house, allowed her an abatement of rent to the extent of Rs. 2,000 per annum; but that it appears from a decision of the High Court that no such dacoity took place; and the plaintiff, now urging that the story of the dacoity was a fabrication, and fraudulent, put forward to induce him to grant the abatement of rent, sues to recover his full rent, as if no such abatement had been allowed.

The defendant states that a dacoity did take place, and that she is entitled to the remission of rent which has been granted to her, and that she is willing to the pay the balance, with the exception of the rent of that portion of the putnee jumma of which one Rowshun Jan had obtained possession by decree of Court passed in a suit between Rowshun Jan and the plaintiff.

The amount claimed in this suit was, with interest, Rs. 14,657. The Assistant Collector of Purneah, Mr. Wyer, fixed the 7th May for the attendance of the defendant, and, in the summons to the defendant, directed that he should, if possible, have his witnesses in attendance on that day. On the 7th the hearing was deferred to the 9th. On that day the agents of the plaintiff and defendant were shortly examined. The plaintiff wished to put in a copy of the judgment of the High Court, but the Assistant Collector refused to receive it. He adjourned the further hearing to the 11th May, and on that day again adjourned it to the 18th, because he was engaged in Magistrate's duties. On the 18th he decided that, as the plaintiff had allowed the abatement of rent, he could only recover the remainder of his claim, and that the rent due on the portion of land obtained by Rowshun Jan should also be deducted.

The Advocate General, on appeal, urges that this grant of abatement of rent by the plaintiff was a voluntary act on his part, from which he could resile at any time; that no consideration was paid for it; and that it had no binding force. But as he admits that no notice of such intention to resile from the agreement was given to the defendant, we think that that argument cannot be sustained, even if his contention is correct in law, upon which we give no opinion. It was not a point raised in the Lower Court. The allegation of the plaintiff then turned wholly on the question of fraud. The Assistant Collector refused to receive the judgment of the High Court in the case of dacoity referred to, because it was no evidence in a civil suit. There is no doubt that it is not conclusive evidence; but, in order to ascertain the truth of the case which the plaintiff attempts to make out, we have thought it right to receive the judgment and file it on the record We find that that judgment by no means decides whether any dacoity took place or not. The opinions of the Judges who gave it are not to the same effect, and the only point it really decided was that the prisoners accused before them were not guilty of the crime. It appears also that this abatement of rent was granted by the plaintiff long after that decision was passed, and the decision therefore cannot have any effect in this suit.

But the question still remains whether the plaintiff was induced to grant this abatement upon a fraudulent misrepresentation made to him as to the occurrence of the dacoity. The Advocate General points out that the Assistant Collector has not made any attempt to decide this issue. Mr. Gregory, on the other hand, urges that the plaintiff was bound to produce his evidence on this point at the hearing before the Assistant Collector on the 9th May, and that as the only evidence he then offered was the judgment of the High Court, which did not prove that any fraud occurred, the Assistant Collector was right in deciding as he did.

We are of opinion that the procedure of the Assistant Collector in this suit is not according to the rules laid down in Act X of 1859. Section 61 of the Act lays down that if either of the parties shall bring forward a witness on the day fixed for the first hearing of the suit, the Collector may take the evidence of that witness. In this case the parties did not produce their witnesses on that day. Section 73 of the Act then declares that if, after the

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examination of the parties, and the examination of any witnesses who may have attended, and after a consideration of the documentary evidence adduced, a decree can be properly made without further evidence, the Collector shall make his decree accordingly. This is the course which the Assistant Collector adopted. But it is evident that further evidence was necessary. It was not proper that the suit should be decided without giving time to the parties to produce their evidence on the issue which had been raised between them as to whether a fraudulent misrepresentation had been made to the plaintiff as to the occurrence of the dacoity. If the plaintiff has been induced to grant an abatement of rent in consequence of any such misrepresentation, he is entitled to have the agreement made by him on that misrepresentation set aside. The Collector, in his decision, has taken no notice of this, the one important issue in the suit. He should have, under Section 65, Act X of 1859, declared and recorded such issue, and have fixed a convenient day for the examination of witnesses upon it. The case must be remanded to him in order that he may now adopt the procedure so laid down in the law. Mr. Gregory argued as if the Collectorate Authorities, under Act X, had the same powers as Judicial Authorities under Act VIII of 1859, to fix the first hearing of the suit, either as a final hearing on which the parties were bound to have their witnesses in attendance, or as a hearing solely for the fixing of issues. But this is not a correct view of the law. It is altogether within the discretion of the parties whether they shall produce their witnesses in Court on the first hearing. If they do so produce them, the Collector may take their evidence, and decide the case. But the parties are not in any way injured if they do not secure the attendance of their witnesses on that day; and if they do not, and there are, on the examination of the parties, issues upon which evidence is necessary to enable the Court to decide such issues, the Court is bound, under the law, to fix a day for the hearing of the evidence upon those issues. We have some doubt whether the law is correctly administered upon this point, and we have therefore most carefully consulted the provisions of the Act, and we have no hesitation in laying down that the procedure now pointed out is the correct procedure under the law.

We have also to point out to the Assistant Collector that he must find upon some evidence as to the extent of the share which has been decreed to Rowshun Jan, the rent payable to her, and the period for which it is due.

The orders of the Assistant Collector are reversed, and the case is remanded to him for retrial.

CASE 1249 OF 1867.

15th February.

Special Appeal from Nuddea.

Deendyal Poramanick (Plaintiff) *Appellant, versus* Ramcoomar Chowdhry and others, (Defendants) *Respondents.*

Before *Phear* and *Dwarka Nath Mitter*, J. J.

Baboo Otool Chunder Mookerjee for Appellant.
Baboos Nilmadhub Ghose and *Greesh Chunder Mookerjee* for Respondents.

A Court has always a discretion to restore to its file a case if struck off therefrom undetermined.

We think the Lower Appellate Court has misapprehended the position in which the case was when it came before it. The Deputy Collector, on being assured that the parties had come to a final settlement, whether judicially or not, we do not say, struck the case off his files, instead of giving a final judgment between the parties. Afterwards he was satisfied that the parties had not settled the matter in dispute, and that, in fact, it had never been intended by them that the suit should altogether drop; he accordingly replaced the case, and tried it on its merits. We find it impossible to say that he had no jurisdiction to do this. He had not, when he restored the case, given any judicial determination of the issues in litigation before him and was not, as we think, *functus officio*. It must always, in our opinion, be incidental to every Court of Justice to be able, in its discretion, to restore to its files any

case which it has itself removed therefrom undetermined. No doubt, this discretion ought never to be lightly exercised. But in this case the discretion of the Deputy Collector is not impeached, and, as far as we can see, he acted rightly in restoring the case, whatever may with propriety be said as to the course which he took previously in striking it off.

The decision of the Lower Appellate Court is reversed, and the case is remanded to be tried on its merits.

Special Appeal from Moorshedabad.

CASE 1971 OF 1867.

26*th February.*

Dhunput Sing Dongur, (Plaintiff) *Appellant, versus* Ruhman Mundul, (Defendant) *Respondent.*

Before *Markby* and *Dwarka Nauth Mitter*, J. J.

Mr. R. T. Allan for Appellant.
Baboo Mohineemohun Roy for Respondent.

Limitation in suits against agent for moneys received. Effect of fraud. Knowledge of the fraud not necessarily contemporaneous with the possession of means of knowing such fraud.

The plaintiff in this case sued his agent in the Collector's Court for money received on his account. The defendant set up a plea of limitation. Both the Lower Courts held that the suit was not brought within one year of the termination of the agency, and on that ground dismissed the suit.

Upon appeal by the plaintiff, two objections have been taken: *first*, it is said that the date of the determination of the agency was wrongly fixed in Choitro, 1271; for, on that occasion, the defendant was only suspended. Now it is true that suspension may be a very different thing from dismissal; but we think that in this case the Judge uses the word "suspension" in the sense of dismissal, for the plaintiff himself in his plaint makes use of a vernacular expression which implies a complete removal.

The other objection is this. The plaintiff sought to extend the period of limitation, on the ground that fraudulent accounts were delivered, and that the suit was brought within one year from the time when the fraud was first known to him, and the appellant now complains of the way in which this part of the case has been disposed of. The Judge says:—' 'No special limitation on the ground of fraud can be allowed, since the fact of suspension is the evidence of the discovery or the suspicion of fraud." We are of opinion that this is not a satisfactory finding. A specific date was stated by the plaintiff as the time when he discovered the fraud, and the Judge should have found specifically when the fraud was first known to the plaintiff. The Judge says that at the suspension there was a suspicion of fraud; but this is a very different thing from knowledge; and it is knowledge, not suspicion, which is spoken of by the statute (Section 33 of Act X of 1859) which applies to this case.

It has, however, been further contended that, as it is found as a fact that the accounts were delivered before Srawan, 1272, the suit, which was not commenced till Bhadro, 1273, is manifestly too late. It is argued that when the accounts were delivered the plaintiff had the means of knowing that a fraud had been committed; and that when he had the means of knowledge, he must be taken to have known of the fraud. But we cannot give our assent to either of these propositions. An inspection of the accounts would, in many cases, give no information as to the fraud, which might be only discoverable by comparing the accounts with other sources of information. Nor are means of knowledge, and knowledge, in a general sense, identical. Suppose a large mass of papers and accounts to be handed over by an agent to his employer; it may be that by a long, careful, and patient examination of these, a fraud would be discovered, and the employer has therefore in his hands the means of knowledge. But how can it be said that means of knowledge is in such a case equivalent to knowledge? On the other hand, we do not at all mean to hold that a man is at liberty carelessly to shut his eyes to information within his reach, and in this or other ways, means of knowledge may sometimes be very properly said to be equivalent to knowledge.

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We have no doubt that this is the true explanation of the expressions used by Mr. Justice Morgan in the case which has been cited from III Weekly Reporter, Act X Rulings, 121. It could not have been intended to lay down as an abstract proposition that, when fraudulent accounts are delivered, the suit must be brought within one year from the date of delivery, for the Act makes a most clear distinction between the delivery of the accounts and the discovery of the fraud, which distinction, a decision in the sense contended for would wholly annihilate.

The case will therefore be remanded to the Judge to try the question whether fraudulent accounts were delivered by the defendant to the plaintiff; and if so, when the fraud was first known to the plaintiff; and he will dispose of the question of limitation in accordance with this finding.

CASE 1850 OF 1867.

28th February.

Special Appeal from Rajshahye.

Ranee Kristomottee Dabea, (Plaintiff) *Appellant, versus* Ramnidhee Sircar and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Dwarka Nauth Mitter*, J. J.

Baboo Debendronarain Bose for Appellant.

Baboos Nobokishen Mookerjee and *Luckeechurn Bose* for Respondents.

The proprietor of a tenure is not debarred from measuring it, by the fact that he had leased it to another, the said lease being about to terminate.

Seton-Karr, J.—The decision of the Judge in this case is erroneous in law. The plaintiff sought the assistance of the Court to measure a mehal, and was resisted by the ryots, on the ground that the mehal was an ijarah, and that the plaintiff, the applicant for aid in measurement, was not in the receipt of the rents.

The Deputy Collector overruled this plea, because the plaintiff was the admitted proprietor of the mehal, and the ijarah was about to terminate.

On appeal, the Judge ruled that the plaintiff not being at the time of his application in the receipt of the rents, and the mehal being leased to a third party, he has no right to ask the aid of the Court.

In appeal before us, two decisions of this Court have been quoted by the respondent in favor of the Judge's decision. The latter of these decisions refers to Section 10 of Act VI of 1862, and not to Section 9, which is now before us. The other decision,* at first sight, might seem to countenance the

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* *Special Appeal from Dacca.*

Case 3334 of 1866, 26th April, 1867.

Before *Norman* and *Seton-Karr*, J. J.

This is a suit brought by the plaintiff, who claims four annas of a certain property by conveyance from the mortgagee, and twelve annas as purchaser of a certain shikmi tenure, seeking to establish his right to measure the lands comprised in the estate.

The Judge has dismissed the suit, upon the ground that Act VI of 1862, Bengal Council, "was never intended to give the Revenue Courts power to decide between conflicting claims under equal titles, but only to give assistance to proprietors when resisted by squatters and others, either forcibly resisting measurement, or setting up subordinate tenures which they could not establish."

The words of the 9th Section of Act VI of 1862 are as follows:—"Every proprietor of an estate or tenure, or other person *in receipt of the rents of an estate or tenure*, has a right of making a general survey and measurement of the lands comprised in such estate or tenure," &c.

It seems clear that the expression "in receipt of the rents" overrides both the prior members of the sentence, and extends not only to "other persons," but also to the "proprietor of the estate or tenure." In the present case, the plaintiff has not, by his plaint, ventured to state distinctly that he is in receipt of the rents; and it is clear that the suit is one to establish a title under some conveyance made to him very shortly before the institution of the present suit. It is not a suit in which a zemindar in quiet possession seeks to enforce the ordinary rights of a zemindar against his tenants.

It is clear that the plaintiff's case does not come under the words of the 9th Section, and we are perfectly convinced that that Section never intended to give a party a right to sue for possession of land under color of the assertion of a right to measure.

We dismiss the appeal with costs and interest.

contention of the respondent; but, on looking closely into that case, it appears that the judgment proceeded on the ground that the plaintiff was seeking to establish his actual title, which was disputed, under pretence that he had a right to measure the land; and the Judges held that "Section 9 was never intended to give a party a right to sue for possession of land under color of an assertion that he had a right to measure."

In the case before us, the plaintiff's title and position are undisputed; he is the actual proprietor of the mehal, and we do not think that he was barred from measurement by a lease which, it appears in this instance, was on the point of terminating

The decree of the Judge is set aside, and that of the Deputy Collector is restored, the appeal being decreed with costs and interest.

Mitter, J.—I only wish to add that the words of Section 9 are clearly in favour of the special appellant. A man who is the admitted proprietor of a mehal is not bound to show that he is in actual receipt of the rents at the time when he applies to measure the land. The words "in receipt of the rents" have no reference to the first part of the Section, *i. e.*, to the words "proprietors of tenures and estates," but to the words "other persons," or other than those who are admittedly proprietors of the mehal or tenure within which the lands to be measured are situated. The conjunction "or" is disjunctive, and not copulative.

I concur in the order decreeing the appeal.

Special Appeal from Beerbhoom.

CASE 778 OF 1867.

2nd March.

Shamchand Ghose Mundul, (Plaintiff) *Appellant, versus* Doya Moyee Mundulnee and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Debendur Narain Bose for Appellant.
No one for Respondents.

In a suit for rent, where a third party claiming to be the ryot of plaintiff is made a co-defendant at plaintiff's request, plaintiff cannot get rid of the consequences of his own act, though such intervention is not contemplated by Act X.

Objection is taken to the order of the Judge making Kangal Mundul a party to this suit, which was brought by plaintiff to recover rent for 1271 at an enhanced rate, after service of notice, against Bukronath Mundul, the tenant, and another, the son of Kangal Mundul.

Kangal Mundul intervened, alleging that he was the real ryot, and that he held the lands in his son's name, and that Bukronath had no interest in, nor possession of, them.

The intervenor, at the request of the plaintiff, was made a party to the suit. The Judge is wrong in saying that he was made a party under Section 79 of Act X of 1859. That Section is quite inapplicable to a case like this; but as Kangal Mundul was made a party at the request of the plaintiff, the latter cannot now get rid of the effect of his own act.

On the evidence, the Judge finds that it is quite untrustworthy, and therefore we see no grounds for admitting the special appeal, which we dismiss.

Regular Appeal from Rungpore.

CASE 237 OF 1867.

3rd March.

Puddomonee Dassee, (Plaintiff) *Appellant, versus* Banee Kant Ghose and others, (Defendants) *Respondents.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Mr. R. T. Allan and *Baboo Khetturmohun Mookerjee* for Appellant.
Baboo Ashootosh Chatterjee for Respondents.

A sharer in joint estate may sue the

This was a suit under Section 24, Act X of 1859, and the plaintiff, one of two shareholders, sued to recover certain accounts and papers alleged to

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agent separately for papers and accounts. He need not make his co-sharers parties to the suit.

have been kept by her agents, the defendants, in the course of their employment as agents.

The Court below held that it was necessary that the other shareholder should be made a party to the suit, and that the suit would then lie in the Civil, and not in the Revenue Court, and dismissed the suit with costs.

In appeal before us, it is contended that the plaintiff, as zemindar, is entitled, under Section 24, to sue, and that the fact of her having a shareholder does not necessitate her making that shareholder a party to the suit; nor does it deprive her of her remedy under the Section relied upon.

We think that this contention is sound. The words of the law are explicit that the zemindar has a right of suit; and it is nowhere in the law declared, nor are there any decisions of the Courts by which that right is taken away, simply by reason that the zemindar is only one of several shareholders.

We think also that those cases in which it has been ruled that one of several joint landowners is not entitled to sue separately for his share of the rent, stand upon different grounds from a suit like the present.

We therefore set aside the decision, and remand the case to the Court below, with instructions that the Court do entertain and determine the suit on its merits.

If it should be found that the plaintiff is entitled to recover any accounts or papers, the Court can direct that such accounts or papers be filed in Court, and not returned therefrom, and that plaintiff be allowed to take such copies, or otherwise to have such access to such accounts or papers, as she may desire.

Costs to follow the ultimate decision of the case.

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CRIMINAL JURISDICTION.

CRIMINAL RULINGS.

Construction of Section 490 of the Indian Penal Code, relating to criminal breach of contract of service on a voyage or journey.

Reference to the High Court under Section 434, Code of Criminal Procedure, from the Sessions Judge of West Burdwan, in the case of Mr. Sage versus *Nirunjun Chatterjee.*

Before *Kemp* and *E. Jackson*, J. J.

We have great doubts whether the words "during a voyage or journey" do not limit the offence made punishable under Section 490 of the Indian Penal Code to offences against travellers. Even, however, allowing that the first Clause of the Section admits of a wider construction, we think that the contract now under reference does not come within it. This contract is not only to convey the complainant's coal from one place to another place, but to place the defendant's carts at the disposal of the complainant for two years to convey his coal from where he pleases to where he pleases. There are two places mentioned in the contract as those from which the carters are to convey the coal, and to which they are to take it; but the carters also state that they will, when necessary, convey it from any other place to any other place. We have great doubts also whether personal service is the essence of this contract, as the carters do not agree personally to convey the coal, but to "cause" it to be conveyed.

We think we ought not therefore to interfere in this case.

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SMALL CAUSE COURT AND OTHER REFERENCES.

Reference to the High Court from the Judge of the Small Cause Court at Santipore.

No. 482.

Joylall Sheikh, *Plaintiff, versus* Brojo Nath Pal Chowdhry and others, *Defendants.*

No. 483.

Brahma Bagdinee *versus* Brojonath Pal Chowdhry and others.

Before *Peacock*, C. J., and *Hobhouse*, J.

Where A, a zemindar, in collusion with B, his ryot, distrains the crop of C, another ryot, having no connection with A or B, C cannot sue in the Small Cause Court for damages. The jurisdiction of the Revenue Courts in such suits is absolute.

Cases.—The facts of this case, No. 482, to which No. 483 is analogous in every respect, are these:—Defendant No. 1, between whom and plaintiff the relation of landlord and tenant does not exist, applied for assistance to the Collector under Section 119 of Act X of 1859, and having obtained it, distrained plaintiff's paddy, alleging that it was the property of defendant No. 4, who is defendant's first ryot, and in collusion with him. Defendant No. 1 had the paddy cut and carried away on the 17th and 18th Aughan. On the 20th plaintiff filed a petition in the Deputy Collector's Court, under Section 139 of Act X, stating that defendant No. 1 had cut, and was carrying off, his paddy, and praying for its release and damages. The Deputy Collector directed the plaintiff to furnish security to the value of the crop, ordered that it should be given up to him, and issued a summons to defendant No. 1. Meantime, plaintiff tried to get possession of the paddy (for which he had given security according to the Deputy Collector's order) from defendants Nos. 5, 6, and 7, in whose custody, as required by Section 118 of Act X, it was stated to have been deposited by defendant No. 1. Plaintiff was unable to get possession of the paddy, and his suit, under Section 139, was subsequently heard by the Deputy Collector, and dismissed for two reasons:—*first*, because the party whose paddy defendants alleged he was distraining, was not made a co-defendant, as required by Section 139; and, *secondly*, because no legal distraint had been proved. The Deputy Collector observed that, had there been a legal distraint, plaintiff could have got the paddy from the parties in whose charge it was stated to have been placed. Plaintiff having lost his suit in the Revenue Court, now sues for damages in this Court, and the question on which the opinion of the High Court is solicited is whether, on the above facts, the case is cognizable by the Small Cause Court or not.

Clause 7, Section 23, Act X of 1859, lays down that "all suits arising out of the exercise of the power of distraint conferred on zemindars and others under Sections 112 and 114 of this Act, or out of any acts done under color of the exercise of the said powers as hereinafter particularly provided," shall be cognizable by the Revenue Courts, and no other. The wording of this Clause is very comprehensive, and I confess that I was at first of opinion that it embraced cases like the present one. A more attentive examination, however, of the subsequent Sections relating to distraint has led me to doubt the correctness of that opinion.

The Sections particularizing the different circumstances under which suits relating to distraint may be instituted, are Sections 124, 126, 139, 140, 141, 142, and 143. Section 124 applies to cases in which application for sale of the distrained property has been made to the Civil Court Ameen, and in which the officer has served the defaulter with a notice either to pay the demand, or institute a suit to contest it. This contemplates a more advanced stage of proceedings than was reached in the present case. Section 126 seems also to contemplate cases in which application for sale has already been made to the Ameen; it states that "when such suit is instituted, the Collector shall proceed in the manner prescribed in the last preceding Section," *viz.*, that he shall transmit to the Civil Court Ameen or other officer, or, if so requested, shall deliver to the owner of the distrained property, a certificate of the institution of such suit, and on such

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certificate being received by or presented to the Ameen or other officer, he shall suspend proceedings relating to the sale of the distrained property.

Section 139 (under which plaintiff sued before the Deputy Collector) seems, at first sight, applicable to the present case; it supposes, however, that the distraint is being legally and regularly carried on, and that the crop is in the custody of a party who is in a position to deliver it up on security. Such was not the case here. The crop had been already carried away by defendant. Again, the relief prescribed in Section 139 is "the release of the distrained property with costs, and such damages as the circumstances of the case may seem to require." The case of Sheikh Gurriboollah *vs.* Sayafulla, 3 Wyman's Reports, 61, indicates the construction to be put on this Section. It is there observed:—"Section 139 provides for a suit by a third party, not for damages, but for the release of the property distrained." In plaintiff's suit before the Deputy Collector, a decree for the release of the distrained property would have been a dead letter, as that property had already been made away with by defendant.

Section 140 has evidently no bearing on a case like plaintiff's. Section 141 contemplates cases where there has been a sale. Section 142 is very comprehensively worded, and would seem to include all cases where the distrainer, by acting illegally, has caused any injury to the owner of the property distrained. On turning, however, to the ruling already quoted, I find the learned Judges observing that "Section 142 refers to a case where the property distrained is of a ryot who does not deny that relation to exist between himself and the distrainer." In the present case that relation is denied by both parties.

Section 143 applies to cases where a person not empowered to distrain property under Sections 112 and 114, nor employed for the purpose under a written authority by a person so empowered, distrains or sells, or causes to be sold, any property under color of the Act. Now, I take it that the words "empowered to distrain property" do not mean "empowered to distrain the particular property" in question in a case about which a suit may have arisen, but that they are used to indicate persons who, from their position as zemindars, lakhirajdars, &c., are by law invested with the general power of distraint. In the present case, defendant No. 1 is a zemindar, and carried on the distraint through defendant No. 2, his gomasta, and there is no allegation on the record that the latter was not duly empowered according to Section 114. I think therefore that defendants are persons empowered to distrain property, and that they do not therefore come within the purview of Section 143.

On the whole, I am of opinion that, inasmuch as the circumstances of the present case are such that none of the Sections of Act X relating to distraints are applicable to it (Sections 139 and 142 being considered in connection with the *dicta* of the High Court in Gurribullah's case above quoted), plaintiff was without a remedy under Act X, and that his suit is rightly brought in this Court.

Judgment of the High Court.—The facts of the case are that the defendant No. 1 applied for assistance to the Collector under Section 119 of Act X of 1859, and having obtained it, distrained the plaintiff's paddy, alleging that it was the property of defendant No. 4, who is found to have been the ryot of defendant No. 1, and to have been in collusion with him.

It is found also that the relationship of landlord and tenant did not exist between the plaintiff and the defendant No. 1. It appears also from the finding of the Judge of the Small Cause Court that defendants Nos. 5, 6, and 7 took possession of the paddy, having been appointed under the provisions of Section 118 of Act X of 1859 to take charge of the property.

The question is whether the suit is cognizable by the Small Cause Court or not.

It has been contended before us that defendants Nos. 5, 6, and 7 may be liable to be sued in the Small Cause Court for what they did subsequently to the distress, even if the defendant No. 1 is not liable to be sued in that Court for making the distress; but, as I understand, the question is whether the Judge

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of the Small Cause Court has cognizance of the suit against all the defendants for all the acts complained of.

Now, with reference to defendant No. 1, the question is whether he is liable to be sued in the Small Cause Court for distraining the plaintiff's paddy, or whether the suit against him for making the distress was cognizable only by the Revenue Court under the provisions of Section 23 of Act X of 1859.

The Judge has found that the plaintiff's paddy was distrained as the property of the defendant No. 4; but he has not found whether the paddy which was distrained was growing on land which the defendant No. 4 held and occupied as the ryot of defendant No. 1, or upon lands occupied by and belonging to the plaintiff, with which the defendant No. 1 and defendant No. 4 had no concern. The paddy might be the plaintiff's property, because it grew upon his own land, or it might be his property, even if it grew upon land held by defendant No. 4 as the ryot of defendant No. 1, for defendant No. 4 might have transferred it to the plaintiff by sale or mortgage. If it were growing upon land belonging to plaintiff, and in his occupation, with which neither defendant No. 4 nor defendant No. 1 had any concern or interest, a suit for distraining it would lie under Section 143 of Act X. But if the paddy was growing upon land held by defendant No. 4 as the ryot of defendant No. 1, it was liable to be distrained by defendant No. 1 for any rent due to him, which had not been due for a longer period than one year, even though the defendant No. 4 had transferred it to the plaintiff by sale or mortgage. (*See* Sections 112 and 113, Act X of 1859.)

If defendant No. 1, in collusion with defendant No. 4, distrained under color that rent was due from defendant No. 4 to defendant No. 1, when no rent was due, the plaintiff would be entitled to sue the defendants for damages.

The question is whether a suit brought under Section 139, or under Section 143, can be brought in the Civil Courts, or only in the Court of the Collector.

If Section 23 applies to the case, the suit is not cognizable in any other Court than that of the Collector.

By Clause 4 of that Section, all suits for arrears of rent due on account of land are within its provisions; and by Clause 7, all suits arising out of the exercise of the power of distraint conferred on zemindars and others by Sections 112 and 114 of Act X, or out of any acts done under color of the exercise of the said power, as particularly provided in the said Act, are also within the provisions of that Section. It appears therefore to have been the intention of the Legislature, whether wisely or not, it is not for us to say, to render suits for arrears of rent on account of land, and suits arising out of the exercise of the powers of distraint conferred by that Act, or out of any acts done under color of the exercise of the said powers, cognizable only by the Collector.

It has been contended before us by the vakeel for the plaintiff that the words "as hereinafter particularly provided," which are used in Clause 7, refer to the words "all suits," and not to the word "power;" and we think that he is right in that contention.

All suits therefore which are specially provided by Act X, and which arise out of the exercise of the power of distraint, or out of any acts done under color of the exercise of the said power, are within the provisions of Section 23.

Section 139 provides specially for a suit by a person who shall claim as his own, property which has been distrained for arrears of rent alleged to be due from any other person, and authorizes the institution of a suit by the person claiming the property against the distrainer and such other person, to try the right to the property. Such a suit appears to me to be clearly one of the suits which is referred to in Clause 7. Therefore, if this suit is brought by the plaintiff, claiming as his own property that which was distrained by defendant No. 1, for arrears of rent alleged to be due from defendant No. 4, to try the right to the property, the suit was not cognizable by the Small Cause Court.

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But it is said that, although the fact is not distinctly found by the Small Cause Court Judge, the suit was really brought by the plaintiff for a distraint made by defendant on the plaintiff's paddy growing upon his own land, with which neither defendant No. 1 nor defendant No. 4 had any concern.

If it were necessary, we should send this case back to the Small Cause Court for the purpose of amending its finding as to the facts; but even if it should be found that the facts are as alleged by the plaintiff, we think it would make no difference.

Section 143, Act X, enacts that "if any person not empowered to distrain property under Sections 112 and 114 of this Act, nor employed for the purpose under a written authority by a person so empowered, should distrain or sell, or cause to be sold, any property under color of this Act, the owner of the property might institute a suit under this Act to recover damages from such person for any injury which he may have sustained from the distraint or sale." The Section further says that "the said person should be held to have committed criminal trespass, and should be subject to the penalties for that offence, in addition to any damages which may be awarded against him in such suit."

It is clear that that Section refers to the case of a person distraining under color of the Act when he is not empowered to distrain; and it is clear that, by the use of the words "under color of the Act," the Legislature did not mean under circumstances which were sufficient to induce the distrainer honestly to believe that he was justified in making the distress; for if that had been their intention, they would not have enacted that the distrainer should be subject to the penalties for the offence of criminal trespass.

Section 142 gives an action against a person empowered to distrain, who shall distrain otherwise than under the provisions of the Act. That is an example of a suit arising out of the exercise of the powers of distraint; whilst Section 143 furnishes an example of a suit arising out of an act done under color of the exercise of the said power. Both are suits within the provisions of Section 23, and the present suit is one which might be brought under Section 139 or Section 143, and consequently cannot be brought in any other Court than that of the Collector.

It is said that if it be held that a suit is cognizable only in the Collector's Court against a person who, under color of the act, distrains crops growing upon lands which are not held by him, and which belongs to a person who is not his ryot, we shall be opening a wide door for the commission of such acts with impunity. But that is not the case, inasmuch as a person who commits such an act is liable to be punished criminally, as well as to a suit for damages in the Collector's Court.

If a person sues another, as his ryot, for rent, when there is no pretence or foundation whatever for the allegation that the land belongs to him, or that the defendant is his ryot, or that there is rent due, such suit is cognizable only by the Revenue Courts; and the Legislature seems to have intended to have left to the Collector the sole determination of suits arising out of acts done in the colorable exercise of the power of distress, as well as suits for rents claimed to be due.

It is admitted by the plaintiff's pleader that such a suit as this is cognizable by the Collector, but he contends that the Civil Court has also jurisdiction. But we cannot see anything in the Act which gives the Collector jurisdiction at all, if it does not give him exclusive jurisdiction.

In this particular case it cannot be contended that the defendant No. 1 was not distraining under color of the Act; for it is actually found as a fact that he applied for and obtained the assistance of the Collector under Section 119 of the Act to support him in making the distress. The case cited by the Judge of the Small Cause Court is not analogous, for there the dispute was between the claimant of the property and a ryot, after a distress had been withdrawn by the landlord upon payment of the rent. The cases cited in argument are so shortly given that they are scarcely intelligible.

For these reasons we are of opinion that the suit is not cognizable in the

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Small Cause Court, and an answer to this effect must be sent to the Judge of the Small Cause Court.

The Collector dismissed the suit when brought before him, upon the ground that no legal distraint had been made. The Judge has found that the distress was made with the assistance of the Collector. If the Deputy Collector dismissed the suit which was brought before him, on the ground that no distraint had been proved, we can understand it; but we cannot understand how he could dismiss the suit if a distraint was made merely because it was not legal. The illegality of the distress, if it were made, would have been a ground for decreeing for plaintiff, not dismissing the suit.

It must not be supposed that a plaintiff has no remedy in such a case as this. In this case he seems to have mistaken his remedy, either in not appealing against the decision of the Deputy Collector, or in not having brought his suit against the proper parties. One of the reasons given by the Deputy Collector for dismissing the suit was that the party whose paddy the defendant alleged he had been distraining was not made a co-defendant, as required by the Act.

It may be remarked that as the power of distraint is given by the Act only for rent due from cultivators, the sole jurisdiction may have been given to the Revenue Courts by the Legislature, in consequence of their considering that the amount at stake would generally be small.

Reference to the High Court from the Judge of the Small Cause Court at Santipore.

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Lalmohun Haldar *versus* Mohadeb Katee.

Before *Peacock*, C. J., and *Seton-Karr*, *L. Jackson*, *Macpherson*, and *Hobhouse*, J. J.

Meaning of the term "wholesale." The term of limitation for recovery of the price in a wholesale transaction is the same as for a suit on breach of a contract, that is to say, three years, unless there was a written and duly registered contract.

Case.—The plaintiff in this action sued to recover Rupees 64, being the price of mustard seed sold to the defendant for making oil. The sale was made in Assin, 1270, and the plaint was not filed till Choit, 1273. Is the action barred by limitation under the following circumstances?

I do not find that the parties are merchants or traders within the meaning of Section 8, Act XIV of 1859, so that the period of limitation should be computed from the end of 1270. There were no mutual dealings between them. It is, however, contended that the sale was a *wholesale* transaction; that six years is the proper period of limitation applicable, and that therefore the suit is within time. It is admitted that the mustard seed was sold to make oil, which was sold again by the defendant. If the mustard seed itself were sold again, there would be no doubt as to the transaction being a *wholesale* one. Does it make any difference that the mustard seed was changed into oil, and that the oil was the article sold again? The meaning of the word "retail" in "Wharton's Law Lexicon" is given thus:—"To sell goods in small parcels, and not in gross." In Richardson's Dictionary, "wholesale" is defined to be "a sale in the gross as distinguished from retail;" and retail derived from the French *retailer* (to cut up), has reference to selling goods in small parts or quantities. I think therefore that it is clear that one of the most prominent features in the meaning of the word "wholesale" is the sale of a large quantity; such a quantity perhaps as no individual would require for his own private use. That such quantities are usually purchased by people who intend to sell again, is no doubt the reason that a wholesale purchase has come to be regarded in some measure as a purchase by a person who intends to make a profit by selling again. In the present case, the quantity of mustard seed is quite large enough to satisfy the idea of a sale in gross contained in the word "wholesale."

It may, however, still be urged that the mustard seed itself was not resold, but the oil manufactured therefrom.

A merchant-tailor who purchases cloth in large quantities to sell again in coats, trousers, and waistcoats; a baker who purchases large quantities of flour

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to sell again in the shape of loaves of bread; a brewer who buys hundredweights of hops and barley to sell again in the shape of beer and porter,—would, I think, according to the usage of trade, be regarded as wholesale purchasers. The transformation of the mustard seed into oil is, to my mind, no greater change than the above wares undergo before being sold again. The pearls, in the case of Buldeo Doss Jouharry *vs.* Sreenath Sein, (Jurist, 114) are also in point. I may add that wholesale houses do not limit their sales to those who buy to sell again, but will sell to any one who purchases a quantity sufficiently large to enable them to sell without breaking up or dividing the bales, packages, casks, &c., in which they receive the goods. A cask of wine or beer, or a whole bale of cloth, will be sold, though a few bottles of the former, or a few yards of the latter, must be purchased at a retail establishment. Seeds, from their nature, do not permit of being packed in any large cases or quantities, or at least they are not packed in this country, and to them, therefore, this idea is not so applicable. Having, however, regard to the above considerations, and the usages of trade, I am of opinion that the sale in the present case should be regarded as a wholesale transaction. The point is one upon which no evidence is available, and I have, of necessity, to fall back upon such general usages of trade as may be to some extent judicially noticed. (Taylor on Evidence, Vol. I, page 5.)

If then the sale is to be regarded as a wholesale transaction, the next question is, what period of limitation is applicable to the suit? Is it the period of six years contained in Clause 16, Section 1, Act XIV of 1859?

The cases noted in the margin have been collected in Mr. Thomson's little work on the Limitation of Suits. They were decided on the original side of the High Court, but are none the less applicable, as the law in this respect is the same on the original and appellate sides. These decisions are to some extent contradictory, but the balance of authority seems to be in favor of the six years' rule. The case of Mothoora Lall Pal *vs.* Cheenebeesh Dutt (Sutherland's Small Cause Court Rulings, page 170) is not unlike the present case, unless it be held that the defendant was there merely the agent of the plaintiff. That case, however, decided nothing definitively as to the law of limitation applicable to wholesale transactions. My own opinion, which I am required by law (Section 22, Act XI of 1865,) to express, is in favor of the six years' rule.

Buldeo DasthJouhurry *vs.* Sreena Sein, Jurist, Vol. I., 114.
Chundra Churn Paul *vs.* Ramnarain Sein 1, Coryton's Reports, 8.
Sonatun Goho *vs.* Parbutty Churn Roy.

I therefore solicit the decision of the High Court on the following points:—

First.—Am I correct in holding the sale of the mustard seed for the manufacture of oil to be a wholesale transaction?

Second.—Is six years the period of limitation applicable to wholesale transactions?

This case was referred to a Full Bench with the following orders:—

We are of opinion that in this case the Judge is right in his view that this was a purchase of goods sold by wholesale, and not by retail. As there are conflicting decisions as to whether the period of limitation for goods sold by wholesale is six years or three years, we think that that question must be referred to a Full Bench. It will be important to consider, when that question comes to be decided, whether goods sold by wholesale are not so far provided for by Clauses 9 and 10 of Section 1, Act XIV of 1859, as to prevent them from falling within the general rule of Clause 16.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J., *(the other Judges concurring).*—Two questions were put to this Court by the Judge of the Small Cause Court: *first*, whether he was correct in holding the sale of certain mustard seed for the manufacture of oil to be a wholesale transaction? and, *secondly*, was six years the period of limitation applicable to a wholesale transaction?

The Bench before which the case first came decided that the Judge was right in holding it to be a wholesale transaction; that the goods were not sold

by retail, but were sold wholesale, and the question was referred to this Bench to know whether, if goods are sold by wholesale, and not by retail, six years or three years is the period of limitation.

We are of opinion that three years, and not six years, is the period of limitation. Clause 8 of Section 1 of Act XIV of 1859 enacts that in suits to recover for any articles sold by retail, the period of three years, from the time the cause of action arose, is the period of limitation. Suits therefore for articles sold by retail, whether in writing or not in writing, whether by a contract registered or not registered under the provisions of Clause 10, come within Section 1, Clause 8, and must be brought within the period of three years. Actions for goods sold wholesale do not come within Clause 8, and the question to be determined is whether they fall under Clause 16 as suits for which no other limitation is expressly provided by the Act, or under Clauses 9 and 10 as being provided for by those Clauses. It is clear that a suit brought for non-payment of the price of goods sold by wholesale, is a suit for breach of contract. A suit brought for the non-delivery of the very same goods under the very same contract would be a suit for the breach of contract. A suit for the non-acceptance of these same goods under the very same contract would be a suit brought for the breach of contract. Therefore it appears to me that, whether the suit is for the price of the goods, or for the non-acceptance of the goods, or for the non-delivery, it is a suit for the breach of a contract, and falls within Clauses 9 and 10, not within Clause 16. Clause 9 says:—"Suits brought for the breach of any contract,—the period of three years from the time when the breach of contract in respect of which the suit is brought first took place, unless there is a contract in writing signed by the party to be bound thereby, or by his duly authorized agent."

An action for the non-payment of the price of goods sold by wholesale is within Section 9, unless the contract is in writing, and the limitation is three years.

If the contract is in writing, then we must go to Clause 10 to see what is the period of limitation. That Clause provides that "to suits brought for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or Regulation in force at the time and place, of the execution thereof, the period of three years from the time when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof." In this case the Judge who referred the case has not found that there was any written contract, and consequently, assuming that there was no written contract, the case does not come within Section 10 of the Act. Under these circumstances, the Judge must be informed that the limitation in this case, provided there was no written contract, was three years from the time when the cause of action accrued.

The Judge of the Small Cause Court will be told that the Division Bench have decided that he was right in holding that it was a sale of goods sold by wholesale, and that the Full Bench upon that finding have held that three years was the period of limitation under Clause 9, unless there was a written engagement.

Reference to the High Court from the Judge of the Small Cause Court at Hooghly and Serampore.

1st *February.*

Madhub Chunder Roy (Plaintiff) *versus* Luckee Jalanee and others (Defendants.)

Before *Peacock*, C. J., and *Bayley*, J.

Case.—The plaintiff sues for what he calls damages, on the ground that the defendants executed in his favor an ekrar (agreement) dated the 28th of October, 1864, translation whereof is annexed, by which they stipulated, each of them, to sell fish in his newly-established bazar at Chinsurah regularly every day, and to pay a dhan (fee) of two annas per diem, and bound themselves to

Suit upon a written agreement by defendants to sell fish daily in plaintiff's Bazar. Defendants had bound themselves

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to pay jointly or severally a fixed sum, on failure to perform the agreement. *Held* that this was a penalty, and that plaintiff could only recover the actual damage sustained by him.

pay, each of them, damages to the extent of Rs. 50 in the event of their leaving his bazar and resorting to any other bazar; that in the month of Assin, 1273, B. S., defendants Nos. 1, 2, and 3 left his new bazar aforesaid, and went over to the neighbouring old bazar, where they are now vending fish; and that they have thus rendered themselves liable, under the terms of the above ekrar, each of them, for damages to the extent of Rs. 50, (the suit being laid at Rs. 150) being the amount of damages demandable from the three defendants. The defendants deny the demand, and plead that a suit of this nature, being one for a penalty, cannot be maintained, and that the document upon which the plaintiff sues does not recite any consideration, without which no contract can be valid.

The question therefore on which the decision of the Court is solicited is whether a suit of the nature described above can be maintained, and whether a contract of the nature mentioned above is valid.

It will appear from the agreement, translation of which is annexed, that the defendants bind themselves, each of them, to pay a penalty of Rs. 50 in the event of a breach of the terms thereof; and further stipulate that if any of the joint contractors infringe the conditions of the instrument, he shall be liable for the entire amount payable by them all. Were I to confine my attention to that part of the instrument in which the above stipulation occurs, and to go no further, it would be quite clear that what the plaintiff claims as damages is in reality a penalty. But one of the cardinal rules for construing instruments is that the whole instrument must be read together; and if the rest of the instrument in question showed that the real intention of the parties was that the defendants should pay a certain sum agreed upon by mutual consent as the just amount of the damage which may be sustained in consequence of a breach of the contract, the Courts of Justice would consider what is called a penalty in the instrument in the light of liquidated damages. But the whole instrument shows that the sum which the defendants stipulate to pay is in reality a penalty or forfeiture intended to secure the performance of certain acts. For though the word "damages" occurs in certain parts of the document, and at the conclusion thereof, what the parties intended was that the defendants should attend the new bazar established by the plaintiff, and vend fish therein regularly every day from 9 A. M. to 9 P. M., and to secure the performance of these acts, the plaintiff has exacted from them a promise to pay a certain sum in the event of their omitting to do those acts; and not only that, but also a promise that if any of the joint contractors neglected to do the acts aforesaid, each of them would be liable for the whole amount fixed as payable on breach of the contract. This is clearly a case in which a penalty is sought to be recovered, and against such a penalty a Court of Equity will always relieve; and if a compensation can be made for non-performance of the acts, decree only such compensation in lieu of the penalty, even against the express stipulation of the defendants, proportionate to the damage actually sustained (St. 1314, 1320). In the case of Kemble *vs.* Farren, 3 C. and P. 623, the suit was for breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. The agreement contained various clauses and stipulations between the parties, and each bound himself to pay the other the sum of £1,000 in the event of breach of any of them, and that sum was declared to be liquidated and ascertained damages, and not a penalty, or in the nature thereof. Notwithstanding this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded as a penalty only, and not as liquidated damages. The case now submitted, is, if possible, much stronger than this, and the only relief which the plaintiff can claim is compensation for the actual damage sustained by him. The plaintiff does not allege in his plaint, and it is no part of his case, that he has sustained any actual damage; and, considering the circumstances of the case, it is not possible for him to show that he has sustained any actual damage; nor has he shown that he has sustained any such damage. I am therefore of opinion that the plaintiff's suit must be dismissed.

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(Translation of the Agreement.)

To

Babou Madhub Chunder Roy.

We, the undersigned, Lukhee Jellanee, Kaminee Jellanee Binda Bagdinee, and Surrasuttee Bagdinee, do hereby execute this ekrar (deed of agreement) Being desirous of having a new bazar established, we applied to you, and you have been pleased to grant our request, and undertook to construct new houses at a considerable expense. As, however, you entertain apprehensions as to any of us leaving your bazar, we hereby enter into this agreement, *viz*, that should we, or any of us, leave your new bazar for the purpose of carrying on our trade elsewhere, each of us should pay you a penalty of Rs. 50. If we fail to pay, you shall be at liberty to realize the whole amount mentioned in this ekrar (deed of agreement) in due course of law from all or from any one of us against whom you may wish to proceed.

Further, each of us agree to pay you a (dhan) fee of two annas a day from the date of the establishment of your new bazar, and take a receipt for the same. Without such receipt, we shall not be able to plead payment of any (dhan) fee. We will not quarrel with any one in the bazar, but will attend your bazar regularly every day from 9 A. M. to 9 P. M. Should we infringe any of the terms above stipulated, you shall be at liberty to recover from us damages for breach of contract by suit. For this purpose, of our own free will, we, in full possession of our senses, in a state of sound health, and under no undue influence, execute this ekrar. Dated the twenty-eighth day of October in the year one thousand eight hundred and sixty-four.

Lukhee Jellanee.
Kaminee Jellanee.
Binda Bagdinee.
Surrasuttee Bagdinee.

Witnesses.

1. Khetter Mohun Chatterjee.
2. Kennaram Doss.
Chinsurah.

3. Gopaul Chunder Dey.
4. Eshan Chunder Ghose.
Dhurmpore.

Judgment of the High Court.—This is an action upon contract. It is a suit which can be maintained. There is nothing illegal in the contract, but the sum stipulated to be paid is merely a penalty.

It is not for us to say whether the plaintiff has sustained any damages, that is a question of fact and it has been determined by the Judge.

The plaintiff is not entitled to recover as damages anything beyond that he has actually sustained.

Reference to the High Court from the Judge of the Small Cause Court at Dacca.

1st February.

Kaminee Dassee (Plaintiff) *versus* Bishnoo Nauth Saha (Defendant.)

Before *Peacock*, C. J., and *Bayley*, J.

A suit for arrears of maintenance which has been already fixed by the Civil Court, will not lie in the Small Cause Court.

Case.—Plaintiff sues for arrears of her maintenance fixed by a decree of the Moonsiff of Dacca. Defendant pleads non-jurisdiction, and also urges non-liability, on the ground that the property of plaintiff's husband that was in defendant's hands, and which, in fact, was the cause of the decree for maintenance, is all exhausted, and that defendant has not personal means enough, and that he has already brought an action in the Court of the Moonsiff for release from his liability to support her, which suit is now pending in appeal before the District Judge.

The question for consideration is—Is the case cognizable by the Small Cause

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Court? I am inclined to think it is not. Two rulings of the Hon'ble High Court may be referred to as bearing upon the point,—one dated the 23rd* of February, 1866, in the case of Nobin Kallee Debiah *vs.* Bindoo Bashiny Debia and others, given on a reference from the Small Cause Court of Hooghly, and the other of 4th† December, 1866, in the case of Bhugwan Chunder Bose and others, appellants, *vs.* Bindoo Bashiny Dassee, respondent; the former supports the opinion I have ventured to express above. Plaintiff had first preferred her claim before the Moonsiff of Dacca, but the Moonsiff rejected the case, referring her to the Small Cause Court under the ruling.

* Wyman's Reporter, Vol. I, Small Cause Court References, page 10.

† Sutherland's Weekly Reporter, Vol. VI, page 285.

The case, though purely one for arrears of maintenance already determined, is one not founded upon any contract whatever, express or understood; nor does it fall within any other class specified in Section 6, Act XI of 1865. Moreover, the manner of the defence set forth in this case, I beg to observe, is such as involves points connected with the continuance or otherwise of the obligation imposed by the decree alluded to above,—points beyond the scope of this Court, and specially as a regular suit exactly in the tone of this defence is, as has already been stated, pending in appeal. I this day pass judgment for dismissal of the case for want of jurisdiction, contingent, however, upon the opinion and orders of the Hon'ble Judges of the High Court, for which I take the liberty thus to lay this case most respectfully before their lordships.

Judgment of the High Court.—We are of opinion that the Judge of the Small Cause Court is right in his view, and that the case is not cognizable by the Small Cause Court.

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Reference to the High Court from the Judge of the Small Cause Court at Kishnaghur.

Bhuggoban Tanti *versus* Gobind Chunder Rai.

Before *Peacock*, C. J., and *Bayley*, J.

Where a decree-holder expressly contracts with his debtor to certify to the Court payments made outside in satisfaction of the decree, a suit for damages will lie against him in Small Cause Court for breach of this contract.

Case.—Plaintiff sues defendant for Rs. 23-5-6, alleged to have been paid by him in part satisfaction of a decree of this Court obtained against him by defendant. I find, as a fact, that the sum which forms the subject of action was actually paid to defendant in several small payments made from time to time, and entered by defendant in a hat-chitta, which he made over to plaintiff, promising to take the decree out of Court, where it was being executed, and enter the amount paid on the back of it. Defendant subsequently ignored the payments so made, and proceeded to execute the decree for the full amount specified in it. The question which is submitted for the decision of the High Court is whether plaintiff's claim is barred by Sections 206 of Act VIII of 1859, and 11 of Act XXIII of 1861.

There are several rulings of the High Court on the subject. In the case of Jamir Mundul *vs.* Brojonath Chuckerbutty, Sutherland's Small Cause Court References, page 73, which was a suit brought for the value of goods delivered to a decree-holder in satisfaction of his decree, the High Court held that in a suit brought for damages for breach of an adjustment, or agreement which was made out of Court, and consequently declared illegal by Section 206 of Act VIII of 1859, plaintiff could not recover, adding that if such suits were entertained, the provisions of Section 11 of Act XXIII of 1861 would be nullified.

In the case of Rajah S. C. Ghosal, page 118 of the same work, it was held that a suit by a judgment-debtor to recover money paid by him to be applied in satisfaction of a decree under Act X of 1859, but not so applied by the decree-holder, would lie in the Small Cause Court. Here, however, the decree had been obtained under Act X of 1859, to which the procedure laid

down in Sections 206 of Act VIII of 1859, and 11 of Act XXIII of 1861, is declared inapplicable.

In Alonga Bibee *vs.* Guroo Churn Rai, Sutherland, page 126, the High Court, while holding that plaintiff's suit for money, alleged to have been paid in satisfaction of a decree, would not lie, remark:—"It may be that a judgment-debtor might have cause of action against the judgment-creditor, when, in making such a payment, there was an express contract that the latter would certify the payment to the Court, and the latter failed to act up to that contract."

In Bhupnath Sahi *vs.* Runwan, 7 W. R., page 134, Civil Rulings, it was held that, under Section 206 of Act VIII, the Court could not recognize an adjustment not made through, or certified to the Court by, the decree-holder.

In case No. 317 of 1866, (29th September) Sajan Mundul *vs.* Uzir Mundul, a reference from the Meherpore Small Cause Court, plaintiff had sued to recover the value of paddy made over to the decree-holder in satisfaction of his decree (the adjustment not having been certified to the Court), the cost of execution of the decree and interest, and plaintiff was prepared to prove that the decree-holder (plaintiff in the original suit) had made an express contract that he would certify the payment of the paddy to the Court; but there was no allegation of any express contract in the plaint. It was held by the High Court that plaintiff was entitled to sue defendant for damages for breach of his contract to certify, or for fraudulently omitting to certify, in consequence of which, on an execution fraudulently issued against him, his property was seized. This is the last recorded ruling on this subject on a Small Cause Court Reference.

It would seem therefore that the judgment-debtor can sue for damages sustained by him in consequence of the decree-holder either breaking an express contract to certify, or fraudulently omitting to certify; the latter would seem to embrace nearly every case of an adjustment out of Court when the decree-holder does not certify payments to the Court; for it is certainly fraudulent to accept a payment, and subsequently proceed with the execution, ignoring that payment.

In the present case defendant (the decree-holder) made a memo. with his own hand of the payments made by plaintiff (judgment-debtor) in satisfaction of the decree, and verbally promised that he would take the decree out of Court, and enter the payments on the back of it. He subsequently ignored those payments, and took out execution for the full amount of the decree. I am therefore of opinion, according to the last quoted ruling, that plaintiff's suit will lie in the Small Cause Court. I have given him a decree contingent on the opinion of the High Court.

Opinion of the High Court.—We are of opinion that the Judge is right, and that the suit will lie in the Small Cause Court.

PART VI.

PRIVY COUNCIL DECISIONS.

Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Baboo Dhunput Singh versus Gooman Singh and others from the High Court of Judicature at Calcutta, delivered 20th December, 1867.

Before *Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley*, and *Sir Lawrence Peel.*

Even where the pottah under which a tenant holds does not in its terms confer an hereditary or istemrary title, long and uninterrupted enjoyment of the tenure at the same rent, accompanied by a recognition of its hereditary and transferable character, will suffice to establish its hereditary and istemrary character as against the zemindar.

Distinction between rates of enhancement applicable to ryots and to intermediate holders.

This is an appeal against a decree dismissing the suit brought by the appellant under Act X of 1859 for the enhancement of the rent of lands within his zemindary. The arguments before their lordships raised various questions of some perplexity, and of great public importance; but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the defendants (the actual tenants), and of a right to raise the rent previously paid in the plaintiff (the zemindar). The appellant's title is thus derived. He is the son and representative of Baboo Pertab Singh, who, in 1851, purchased the zemindary in which the lands in question are situate at an execution sale. The execution, though at the suit of Government, was one in a mere civil suit for moneys, and accordingly the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment-debtor, and therefore subject to whatever subsisting interests in the lands had been effectually granted or created by any former zemindar.

The following is the history of the respondent's occupation:—In 1792, shortly after the decennial settlement of this zemindary had been completed, but before that settlement had been declared perpetual, the then zemindar granted the lands in question to one Aghum Singh at an annual rent of 101 sicca rupees, under a pottah, of which the terms and effect will hereafter be considered. Aghum Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the zemindar's receipts or acquittances, which have been produced in evidence, he is described as mokurrereedar. After his death, his sons Pertab Singh and Neerbhan Singh continued to hold the lands on the same terms, and some of the zemindar's receipts, accepting the same rent of 101 sicca rupees from Pertab Singh, and describing him as mokurrereedar, are also in evidence. Pertab Singh died in or before 1838; for, in the proceeding at page 20 of the Record, his son Gooman Singh, one of the present respondents, and Neerbhan Singh are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the zemindary, of which the revenue had been permanently settled in 1793, and were therefore not subject to any claim on the part of Government. The zemindar being no party to this proceeding, it is material only as showing that the title on which the respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of 101 sicca rupees, was received from Gooman Singh; and in these also he is described as mokurrereedar. It is not, however, clear that these last-mentioned receipts were granted by the

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then zemindar or his officers. It seems more probable that they were granted by a receiver who, under the Court of Wards, during the minority or incapacity of the zemindar, or under some other unexplained circumstances, was at that time in possession of the zemindary. It also appears that, although the rent was often taken from one member of the Singh family, as shown by the receipts, there were many persons of that family beneficially interested in the lands, Pertab Singh having left five sons besides Gooman Singh, and Neerbhan Singh having on his death left two sons, Dabee Singh and Akbur Singh. And from one of the documents in evidence in the cause, it appears that fees were paid by the two last-named persons to, and accepted by, the receiver in 1845, on a mutation of names, as upon the devolution of a mokurreree tenure.

The father also of the appellant is shown to have brought, in 1855, a summary suit for the recovery of one year's rent, at the rate of 101 sicca rupees, alleging that the lands were held as mokurreree at that rent by the defendants there named.

So far the tenure, whatever was its nature, remained in the Singh family; but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the respondent, Muddun Lall Doss, had, before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of Gooman Singh, and of one of his brothers; and it is stated in the respondent's case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is that, at the commencement of this suit, the lands had been held as against the zemindar at one unvarying rent since 1792 under a tenure originating in the pottah of that year, but treated, *de facto*, as a hereditary tenure, and from time to time described by both the zemindar and the tenants as a mokurreree tenure; and that as such it has been made the subject of sale and transfer to the knowledge and with the assent of the zemindar, who on one occasion bid, through his manager, for a portion of it.

The first proceeding in the suit was necessarily the notice which the 13th Section of the Act directs to be served on the under-tenant or ryot whose rent is sought to be enhanced. That document stated that the taidad, meaning probably the rent-roll of the lands, was extremely small; that the respondents had produced "no reliable document" showing on what special grounds they occupied them; that, with a view to settle the rent, the lands had been measured, and were found to consist of 11,645 beegahs; and that the rent of them, according to the rate paid by other ryots cultivating the same kind of land, would amount to 24,842 rupees 10 annas 8 pie.

And the plaint founded on this notice accordingly claimed that sum with interest, amounting in all to rupees 26,752 6 annas 9 pie as due from the respondent to the appellant.

The learned counsel for the appellant have argued that the defence set up by the respondents must be taken to be that they are the holders of a mokurreree istemraree tenure, *i. e.*, a hereditary tenure, at a fixed rate under pottah of 1792; and that they must stand or fall according as the terms of that instrument establish, or fail to establish, such a title. Their lordships cannot accede to that argument. It is to be observed that Act X of 1859 (*see* Section 59) does not require the defendants to put in any written pleading. And, in their lordships' opinion, the fair construction of the written statement, which, under the option given to him, the respondent, Muddun Lall Doss, did put in, is that, under all the circumstances stated above, he, and those from whom he derives title, must be taken to have held as hereditary mokurrereedars, which, of itself, would be an answer to the suit; and that if that contention could not be supported to its full extent, they were protected against an enhancement of rent by the provisions of Act X of 1859.

The respondents have been successful in every stage of the suit in the Courts below; but the several decisions in their favor have proceeded on

different grounds. The Collector (the Judge of first instance), in his judgment of the 31st of March, seems to have held that, though the pottah neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the defendants had proved that they had held for upwards of seventy years at one rate, and that the plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the respondents as ryots; and on the first argument in that Court, their counsel argued their case on the assumption that they were properly described as ryots. On that occasion the Judges held that the pottah did not, in its terms, confer any mokurreree title, and that the statement of the appellant's father, and the receipts describing the tenants as mokurrereedars, would not, in the absence of all mokurreree title in the original lease, confer such a title, or form an estoppel to the appellant's suit. But they also held that the law, as declared by the 3rd and 4th Sections of Act X of 1859, conferred, in fact, a mokurreree title on all ryots in the position of the defendants, who held lands at fixed rents which had not been changed since the date of the permanent settlement. The appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what, in legal contemplation, is the date of the permanent settlement, and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th Sections of the Act, which were specially applicable to ryots only; whereas it ought to have proceeded under the 15th and 16th Sections relating to persons possessing a transferable interest in the land intermediate between the proprietor of the estate and the ryots, such as the defendants were; that between these last-mentioned Sections on the one hand, and the 3rd and 4th Sections, on the other, the right may be dependent on the conditions of a lease; whereas, under the latter, it would be independent of the conditions of any lease; and, finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the pottah. The High Court, on this final hearing, held that the defendants were not ryots, but tenants intermediate between the proprietors and the ryots; that they did not hold under terminable lease, nor under the pottah, which did not in any way refer to them, but only to the original lease; but that inasmuch as they had been allowed by the proprietors to hold the tenure without any pottah for fifty years, and ever since the death of the first lessee, and the proprietors had, by their acts, admitted the tenure to be transferable and mukurreree, *i. e.*, permanent, it was not for the Court, sitting as a Revenue Court under Act X of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable, and that the respondents, holding a tenure at a fixed rent which had not been changed from the time of the perpetual settlement, were protected by the 15th and 16th Sections of the Act from enhancement.

It is now assumed on both sides that, whatever was the interest of the respondents in these lands, they were not ryots, but tenants intermediate between the proprietor and the ryots. And one of the points taken for the first time here was, that that being so, they were not subject to the jurisdiction of the Collector under Act X of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by suit in the Civil Court; and for examples of this we were referred to the cases of Ranee Surmoyee and that of Gopal Lall Thakoor, which are both reported in the 10th Vol. of "Moore's Indian Appeals."

Their lordships cannot entertain any doubt of the jurisdiction of the Courts below. Both the cases cited were tried before Act X of 1859 was passed. That Act throughout contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes. And their lordships think that the 23rd Section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, *viz.*, "a suit for the determination of the rate of rent at which a pottah and kubooleut should be given;" or, as what it is in form, a suit for "arrears of rent due on account of land."

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This being so, the first question is, what is the nature of the respondent's sub-tenure? If it can be shown to be mokurreree istemraree there is an end of the case. If this cannot be established, the question whether the respondents are not protected by the 15th and 16th Sections of the Act will arise.

The pottah is addressed to Aughum Singh as "Moostajir," which is translated "farmer" of Mouzah Cheloone and other villages in forests of Sukhooa trees in the Zillah named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as, in accordance with your application, the lands of the villages in the said forests have been assessed with a rental of 101 rupees, everything being consolidated, and a pottah granted to you, it is required that you will, in all confidence, have the lands of the said forests occupied by Perbuttea and other ryots, and keep paying to the sircar the rent year by year according to this pottah, and whenever you may be summoned for the purpose of hunting, you will attend accompanied by all the Perbutteas."

In the course of the arguments for the appellant, a question was raised whether this pottah was more than a lease of the village lands then in cultivation; and whether the greater part of the land now in the occupation of the respondents had not been acquired by subsequent and gradual encroachment. Their lordships, however, are of opinion that the pottah covered not only the lands then in cultivation, but also the forest lands which the grantee was to settle and re-claim by bringing Perbuttea and other ryots upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the appellant now seeks to re-assess. The nature and extent of the interest in these lands, which it conferred on Aughum Singh, have now to be considered.

Upon these points their lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the pottah, taken by itself, cannot be held to have granted a mokurreree istemraree tenure. It does not contain the term "mokurreree," or any equivalent words from which an obligation on the part of the grantor never to raise the rent is fairly to be inferred; nor does it contain the expression "from generation to generation," or other like words importing that the tenure, whether the rent was to be fixed or variable, was to be hereditary. Their lordships cannot accede to the argument for the respondents that a pottah must *primâ facie* be assumed to give an hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's Decisions, still less than that of Freeman *versus* Fairlie, is any authority for such a proposition. Pottah, as may be seen by referring only to Act X of 1859, is a generic term which embraces every kind of engagement between a zemindar and his under-tenants or ryots. Nor can it be disputed that the expressions, here wanting, are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favor of the hypothesis that the intention of the grantor was to create a perpetual tenure at a fixed rent. It may be conceded to the respondents that the zemindar in 1791 may have deemed himself capable of granting such a tenure. For though, according to the preamble of Regulation XLIV. of 1791, zemindars, before the perpetual settlement, have no power to enter into engagements for a period exceeding that of their own engagements with Government, and in 1792 the decennial settlement, which has just been completed, had not been declared perpetual, yet at that time there was every reason to believe that the settlement would be declared perpetual; and the second Section of the Regulation last referred to, which restricts the zemindar's power of disposition, had not been enacted. The whole policy, however, of the decennial settlement, as appears by Regulation VIII. of 1793, was adverse to mokurreree tenures. It made them all subject to re assessment, unless they fell within the protection of the 49th Section of that Regulation. It is therefore not probable that the zemindar would, immediately after the completion of the settlement, grant such a tenure except upon special grounds and adequate consideration, and of these there is no proof. Though the pottah contains some reference to future services as incidental to the tenure, the transaction

on the face of it is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the grantee, of bringing the latter into cultivation. If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of his lands.

But passing from the pottah, taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case. The appellant, as we have already remarked, is not, as was the plaintiff in the case of Gopaul Lall Thakoor (10 Moore's Indian Appeals), which was cited in the argument, an auction purchaser, who, under the revenue laws, can throw upon the tenant the burden of showing that his tenure would have been valid against a zemindar, unfettered by any personal engagement at the time of the perpetual settlement. He is bound by the engagements and acts of his predecessors in the zemindary; and we must consider the evidence of these, as it bears first upon the duration of the tenure, and next upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V. of 1812, there was no restriction upon the disposing power of the zemindar.

The facts already stated afford incontestable proof that ever since the death of Aughum Singh the hereditary character of this sub-tenure has been recognised by the successive zemindars. There is also evidence, which is not contradicted, that some of them have recognised its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the pottah, or that if the original grant were limited, as was suggested, to the life of Aughum Singh, his tenure has, by some subsequent grant, become hereditary and transferable. And upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the zemindar in the Civil Court, to disturb the possession of the respondent, could not be successfully resisted. The case of Joba Singh (4 S. D. A. R., 271) is an authority for the proposition that evidence of this kind will supply the want of the words "from generation to generation" in the pottah, which is the foundation of such a title.

Upon this second point, the evidence of the subsequent acts and conduct of the zemindars is material only in so far as the receipts and proceedings above referred to show that both Aughum Singh and his successors were described as mokurrorcedars. Their lordships are not prepared to say that, from this evidence, a court or jury might not legitimately infer, as against the first zemindar and his successors, either that the rent had been always fixed, or that by subsequent contract that which had been originally variable had been made invariable. It is not, however, necessary for the determination of this appeal that they should so decide, and they are unwilling, without necessity, to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say that if the tenure was or has become hereditary and transferable as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the perpetual settlement, the case, as ruled by the High Court, falls within the protection of the 15th Section of Act X of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression "a terminable lease," it is clear that a tenure, under which the tenant can no longer be dispossessed by his superior, cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the respondents were sued as occupying ryots, liable for the rent assessed upon them in that character, that the High Court held that, considered as ryots, they were protected

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by the 3rd and 4th Sections of the Act, and that thereupon the appellant shifting his ground and treating the respondents, not as ryots, but as tenants intermediate between him and the ryots, obtained an order for review. But if the respondents were tenants intermediate between the proprietor and the ryots, that fact seems to raise objections, both of form and of substance, fatal to the maintenance of the present suit. The notice on which it was founded did not in that case accurately specify the "ground on which enhancement of rent was desired;" and the assessment on which the sum sued for was calculated was improperly made. Dyaram's case (1 S. D. A. R., 139), and the note of Sir William McNaghten at the foot of it, show that where the suit is against an intermediate tenant, the enhancement ought to be made according to the pergunnah rate of the rents payable, not by ryots, but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots must necessarily deprive him of all beneficial interest in his tenure.

Their lordships, however, do not decide this case on this last ground For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

MARCH, 1868.

A GROTE AND E T. TREVOR, ESQS

No. 1.

The Government of India, in Order No. 359, dated 17th January, 1868, from the Financial Department, have required that, from 1868-69, all realizations of fines and penalties imposed by Judicial Officers under the Excise and Stamp Laws shall be credited under "Law and Justice."

2. District Officers will be guided accordingly in excluding such items from entry in their Quarterly Return No. 14 of Excise Revenue, and from their Annual Return No. 35 of Stamps.

No. 2.

In lieu of the first four lines down to the words খাজাঞ্চি শ্রী inclusive, in Bengalee Form No. 1, page 137 of the Revenue Rules, substitute the following:—

কালেক্টরির খাজাঞ্চীর মালজামিনীর ফারম।

মহামহিম শ্রীল শ্রীযুক্ত সেক্রেটরি অফ্ ষ্টেট ফর্ ইণ্ডিয়া।

সমীপেষু।

লিখিতং শ্রী সাং পং

জেলা কস্য মালজামিনী পত্রমিদং কার্য্যনঞ্চাগে আমি আপন স্বেচ্ছাপূর্ব্বক ডিবিজানের রিবনিউ কমিসনারের অধিনে কালেক্টরির খাজাঞ্চি জেলার পরগনার সাকিনের শ্রী

2 In lieu of the first five lines down to the words কর্ম্মে মোকরর inclusive, in Bengalee Form No. 2, page 138 of the Revenue Rules, substitute the following —

কালেক্টরির মোহাফেজ ও আসিষ্টাণ্ট মোহাফেজের হাজির জামিনীর ফারম।

মহামহিম শ্রীল শ্রীযুক্ত সেক্রেটরি অফ্ ষ্টেট ফর্ ইণ্ডিয়া।

সমীপেষু।

লিখিতং শ্রী সাং পং

জেলা কস্য হাজির জামিনী পত্রমিদং কার্য্যনঞ্চাগে জেলা সংক্রান্ত

পরগনার সাকিনের শ্রী

ডিবিজানের রিবনিউ কমিসনারের অধিনে কালেক্টরির সেরেস্তার মাহাফেজী কর্ম্মে নিযুক্ত

3 In lieu of the first four lines down to the words কালেক্টরির নাজীর inclusive, in Bengalee Form No. 3, page 140 of the Revenue Rules, substitute the following.—

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কালেক্টরির নাজীরের মাল জামিনীর ফারম ॥

মহামহিম শ্রীল শ্রীযুক্ত সেক্রেটরি অফ্ ষ্টেট ফর্ ইণ্ডিয়া।
সমীপেষু।

লিখিতং শ্রী সাং পং
জেলা কস্য মালজামিনী পত্রমিদং কার্য্যনঞ্চাগে
আমি আপন স্বেচ্ছাপূর্ব্বক ডিবিজানের রিবনীউ কমি-
সনাবের অধিনে কালেক্টরির নাজীর জেলার
পরগনার সাকিনের শ্রী

4. In lieu of the first three lines down to the words کا هوکر اقرار inclusive, in Order Form No. 1, page 130 of the Revenue Rules, substitute the following:—

نقشه مالضامني خزانچي كلكٹري

بجناب معلي القاب جناب صاحب سكرٹر اف اسٹيٹ فار انڈيه

منكه ساكن پرگنه متعلقه ضلع كا هون

مين اپنے رضا اور رغبت سے مالضامن ضلع پرگنه ساكن

مسمى خزانچي كلكٹري متعلقه كمشنري رينو ڈويزن كا هوكر اقرار

5. In lieu of the first four and a half lines down to the words عمله مذكور کا inclusive, in Oordu Form No. 2, page 131 of the Revenue Rules, substitute the following:—

نقشه حاضر ضامن محافظ و اسسٹنٹ محافظ كلكٹري

بجناب معلي القاب جناب صاحب سكرٹر اف اسٹيٹ فار انڈيه

منكه ساكن پرگنه ضلع كا هون

مين اپنے رضا اور رغبت سے حاضر ضامن ضلع پرگنه ساكن

مسمي محافظ كلكٹري متعلقه كمشنري رينو ڈويزن كا

6. In lieu of the first three lines down to the words کا هوکر inclusive, in Order Form No. 3, page 132 of the Revenue Rules, substitute the following:—

نقشه مالضامن ناظر كلكٹري

بجناب معالي القاب جناب صاحب سكٹري اف اسٹيٹ فار انڈيه

منكه ساكن پرگنه ضلع كا هون

مين اپنے رضا اور رغبت سے مالضامن ضلع پرگنه ساكن

مسمى ناظر كلكٹري متعلقه كمشنري رينو ڈويزن كا هوكر

No. 3.

Under instructions from Government, the Board desire that the following rule be inserted in Board's Rule, Chapter XI, Section XIII, as Rule 17A:—

17A. Government Officers are forbidden to invest public and charitable funds otherwise than in Government Securities, or to deposit such funds save in a Government Treasury, the Bank of Bengal, or one of its transfers.

No. 4.

The Board have now received from Commissioners the reports called for in their Circular Letter No. 3688A. of the 13th September last, on the subject of the Return of Exhibits filed in Suits under Act X of 1859. The instructions given in Board's Rules, Chapter XII, Section III, appear, with few exceptions, to be correctly followed; but Commissioners are requested to take every opportunity of satisfying themselves that the plain requirements of the Law and the Rules are in no case neglected.

No. 5.

Add after "distilleries" in the last line of Clause 7, page 66 of the Board's Rules:—

"And for Cutcherry and all other Excise buildings."

2. Also after "rent of ditto" in the third line at page 184 of the Rules, insert:—

"And of Cutcherry and all other Excise buildings."

No. 6.

In continuation of Circular Order No. 2 of January, 1867, Commissioners are informed that when a Return calls for no special comment, a copy of their resolution to that effect need not be submitted to the Board. It will be sufficient for Commissioners to submit a list of such Returns to the Board, specifying the month or the quarter to which they relate.

No. 7.

The following are to be substituted for Rules 3 and 6, pages 210 and 211 of the Board's Rules:—

3. The Collector is to license as many Copyists as can supply all applicants with copies without inconvenient delay; and no one but a licensed Copyist must be employed in the preparation of copies. Each Copyist is to be paid by the party taking the copy, at the rate of one and a half annas for 100 vernacular words, and two and a half annas for 100 English words, four figures counting as one word. The number of lines to be written on Stamp paper of the large and small sizes, shall be thirty-two and twenty lines respectively. On each copy the amount of the fee received is to be noted as follows:—

Number of words in the copy 0 0 0
At one and a half or two and a half annas (as the case may be) per 100 words, is Rupees 0 0 0
Received payment,
(Signed) A. B.,
Licensed Copyist.

6. Each Copyist is to keep a Register (No. 68) showing his receipts, which he is to submit once a month to the Collector. By this means the Collector will be enabled so to regulate the establishment of Copyists, that each shall earn, with proper diligence, not less than Rupees 20 per mensem. Any marked increase or decrease beyond this limit shall be met by a corresponding change in the number of Copyists employed. 7-3-68.

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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AN ' CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

VOLUME V.

No. 7.—April 3.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month.)

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Regular Appeal from Nuddea.

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CIVIL JURISDICTION

CASE 238 OF 1867.

Sree Hurry Roy and others, (Defendants) *Appellants, versus* Mr. James Hills, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Mr. R. V Doyne and *Baboo Rash Beharee Ghose* for Appellants.
Messrs. G. C. Paul and *R. S. Rochfort* for Respondent.

Destruction of indigo crop by cattle wantonly caused or allowed to trespass therein. Mode of assessing damages. The full value of the prospective out-turn not awarded, but substantial damages given.

Jackson, J.—This is a suit to recover damages for the destruction of indigo plant growing on 250 beegahs of neej cultivation belonging to the indigo planter, by the wrongful act of the defendants in allowing their cattle to trespass upon the indigo lands for several days.

The evidence was to the effect that the defendants' cattle, several hundred in number, had either been driven into the indigo, or, from gross negligence, had been permitted to stray into it The Principal Sudder Ameen, who first tried the case, dismissed the plaintiff's suit, distrusting the evidence. This Court, on regular appeal, held that, although the circumstances had been greatly exaggerated, the evidence proved that some damages had been incurred, and remanded the case to the Lower Court to ascertain the extent of injury, and award damages to that extent. The Principal Sudder Ameen then deputed an Ameen to the spot to report on the extent of injury and amount of damage. The Ameen appears to have acted upon the supposition that the whole of the indigo growing on the alleged 250 beegahs was completely destroyed In the first place he measured the land, and found it to be 210 beegahs, and not 250 beegahs. Then he found, upon the evidence, that the average yield of indigo in that neighbourhood in that year had been thirteen bundles the beegah. Then he calculated, from the papers put in by the plaintiff, and the account-sales of indigo of that year, that this indigo would, if manufactured, have given to the plaintiff about one maund of indigo for 100 bundles of plant, and a profit of Rupees 5,176 He apportioned this among the defendants, according to the number of cattle each was shown by the evidence to have allowed to go upon the lands The Principal Sudder Ameen adopted this report *in toto*, and decreed accordingly.

Mr. Doyne, for the defendants, in appeal to this Court, has argued that the plaintiff cannot recover more than the actual value of the growing plant, as it was when it was destroyed, and that all the damage resulting from what might have been the profit when the plant was manufactured into indigo should have been left out of consideration, such damage being too remote, and not necessarily and immediately arising from the act of the defendants. Mr. Paul, for the plaintiff, on the other hand, refers to a decision of the late Sudder Court, dated the 26th April, 1849, page 124 of the Reports for that year, showing that such damages are sometimes awarded, and contends upon the fact of this case that, although vindictive damages are not asked for, his client is entitled to substantial damages, and to have the point of the profit which he would have obtained from his indigo plant taken into consideration

We think in the first place that the Lower Court has altogether misconceived the remand order. This Court did not find that the whole of the indigo growing on this land had been utterly destroyed, but that some damage had been done, although the facts were greatly exaggerated.

The Ameen, as well as the Lower Court, has enquired into the amount of damages to be awarded, as if the whole of the evidence were true, and there had been no exaggeration at all in the depositions of the witnesses; still we think that we ought not again to remand this case; and, looking to the acts of the parties, we would inflict such a penalty upon the defendants as would, to some extent, remunerate the plaintiff for his loss, and, on the other hand, would prevent the defendants from committing such injury upon him in future. We are not prepared to hold with Mr. Doyne that in such a case the acts of the defendant being, if not deliberately wilful, at least the result of gross negligence, no consideration should be given to the amount

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of profit which the plaintiff might have realized from his indigo plant. One rule, which is often laid down in assessing such damages, is, what is the damage resulting from the acts of the defendants which might have been contemplated by the defendants as naturally arising from the act done? Here the defendants knew perfectly with what intentions this indigo plant had been raised; they knew that its present value at the time they injured it did not in any way correspond with the value which it presented to its owner. The crop was nearly ripe for cutting and for manufacture, and could not at such a season be replaced. The defendants knew that they were allowing a valuable property to be injured. The penalty which they must be made to pay must to some extent be such as to compensate the plaintiff for the loss of that valuable article.

It is very difficult to understand how the acts of the defendants can be held to come even within the hypothesis of gross negligence. Had the cattle strayed into the indigo on one day only, there might have been some excuse, on the ground that their act resulted from the negligence of some one. But here the cattle were allowed to stray in day after day for several days, and the cattle were very numerous. There can be no doubt that the result was serious injury to the plaintiff, who is accordingly entitled to substantial damages. The defendant Sree Hurry Roy seems to have been the principal defendant, and his cattle seem to have been far more numerous than the cattle of the other defendants. We assess the damages against him at Rupees 1,000, and against the other defendants, except Ramjoy Ghose, at Rupees 100 each, and against Ramjoy Ghose we confirm the damages awarded against him in the Lower Court, *viz*, Rupees 71-11-10 The defendants will pay all the costs of this action. The plaintiff will recover interest on the damages here awarded and on the costs of the suit from this date to date of payment.

Kemp, J.—I concur in this judgment, as also in the measure of damages. I think that this is a case in which substantial damages should be awarded. The injury was wantonly caused. The trespass was not confined to one instance, but was continuous; and, further, the defendants, appellants, forcibly rescued the cattle which had been seized damage feasant, and for which they were fined by the Magistrate under Act III of 1857.

In actions of tort, where the wrong has been deliberate and malicious, as in the present instance, the Courts will give liberal damages; and it is well known that in cases of reckless or mischievous acts injurious to others, even where vindictive damages are not claimed, the party in the wrong is often made answerable for consequences very remote from the original act. (Sedgwall on "Damages," page 81, Chapter 3, marginal page 79)

In this case a large area of indigo was destroyed. The cultivation was neej; the crop was ripe. There can be no doubt that the value of the said produce would not adequately represent the value of the crop to the planter; and though the planter is clearly not entitled to recover the full value of the indigo when manufactured, without deductions for manufacturing charges, risk, &c, he is entitled to recover substantial damages, and therefore, without attempting to aim at a complete and accurate estimate of the compensation which would be adequate, I adopt the scale of damages assessed by my learned brother as, under all the circumstances of the case, fair and equitable, with this exception, which I have no doubt Mr. Justice Jackson will concede, that, instead of awarding Rupees 100 as against the defendant Ramjoy Ghose, I would award Rupees 71-11-10, the amount awarded by the Lower Appellate Court.

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CASES 307 TO 318, AND 339 TO 350 OF 1867.

Applications for Review of Judgment in Regular Appeal No. 16 *of* 1866, *dated* 23*rd July*, 1867.

Mr. W. W. Fergusson, (Plaintiff, Appellant,) *Petitioner, versus* The Government and another, (Defendants, Respondents,) *Opposite Party.*

Before *Bayley* and *Markby*, J. J.

Mr. R. T. Allan and *Baboos Tarucknath Sein* and *Bungshee Dhur Sein* for Petitioner.

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Opposite Party.

In suits to assess ghatwali lands, ismnuvisee papers are admissible in evidence, but not binding on the ghatwal. Government should not be made a party to such suits.

In July last, we decided twelve cases as to the rights of a putneedar over certain ghatwals holding lands within his putnee talook, in all of which suits the putneedar was plaintiff.

Mr. Allan, on behalf of the plaintiff, has now applied for a review in all these cases, upon the following grounds:—

First.—Because the ismnuvisee papers were prepared in the ordinary course of business, under the provisions of Regulation XVII, X, or XII of 1807, &c, and they were therefore always received by the Court of this country as good legal evidence of the extent of the ghatwally tenure.

Second.—Because the Police Reports show that the preparation of the ismnuvisee was made according to law, and was a correct statement of facts.

Third.—The finding of this Honorable Court of defendants' possession for more than sixty years is opposed to the actual state of things, as the lands in dispute were formerly jungle, and have been gradually cleared and cultivated by way of encroachment.

Fourth.—When the defendants have not produced their title-deeds, and have not proved their right to the disputed land, they are in no way entitled to the lands which are still in jungle state, and are not in actual possession of anybody.

Fifth.—If the ismnuvisee papers be accepted as good evidence, the allegation of defendants' possession before the permanent settlement, or of sixty years back, must fall to the ground.

It is not very easy to comprehend these grounds of review as they stand, still less are we able to see that they raise any point not fully disposed of at the hearing. Mr. Allan has attempted again to convince us that these ismnuvisee papers are binding and conclusive on the ghatwals. But he brings no authority for such a proposition; nor is it probable that he could do so, for it would be contrary to the principles of justice if a man's title to land were to be for ever barred by such records as these. Mr. Allan further contends that these papers are at least good *primâ facie* evidence until rebutted. But that is exactly how we have treated them. No question was raised on either side as to their admissibility, nor was it ever denied that they were entitled to some weight The sole question was how far they were outweighed by the evidence for the defendants. Mr. Allan has brought to our notice a decision of Mr. Justice Glover of the 18th September last, from which it appears that a review was applied for in some similar cases, on the ground that we had held that the ismnuvisee papers were inadmissible in evidence. But our judgment was not then printed, and Mr. Justice Glover appears to have been misinformed as to the nature of it. To prevent any future misunderstanding, we repeat most distinctly that no question as to the admissibility of these documents was before us.

Another point raised on this review was that the question of limitation, by reason of sixty years' possession, was not open on the two cases (Nos. 305 and 306) to which it has been applied by the Court. But we consider that it was. The plea of limitation was taken in the Lower Court *generally*. The Judge applies himself to the question of possession, and finds that the defendants have been in possession from before the decennial settlement. Upon this he holds

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that the plaintiff is barred by the twelve years' limitation. This view of the case would, as we have pointed out, have led us to consider a number of questions of law and fact, in all probability ultimately leading to a remand. But this was wholly unnecessary; for if the defendants have, as the Lower Court held, been in possession from before the decennial settlement, there seemed to us to be more than one complete answer to the plaintiff's case. One of these is under Clause 3, Section 3 of Bengal Regulation II of 1805, making sixty years a complete bar; and this Regulation was distinctly relied on during the argument, without objection on the part of the plaintiff that the plea had not been taken below.

Failing on these points, the plaintiff has now made an application of rather a novel kind. He says that he was taken by surprise by the view which this Court has taken of the ismnuvisee papers, which had been always treated as sufficient to prove the putneedar's right to assess; and he now applies to us to grant this review, in order that we may remand these cases to obtain further and better evidence in support of the putneedar's right, or that we may take this evidence ourselves; and he supports this application by a statement that two hundred cases have been decided against him upon the authority of our decision. He does not state what the evidence is which he wishes to supply, nor that it was not within his knowledge, or could not have been adduced by him when the decree was passed. The argument on these appeals lasted three days, and we took some time to consider our judgment; and though it must have been pretty clear that the plaintiff stood in some peril of losing his case if he relied on these papers alone, no application was then made to us to admit this evidence, except that Mr. Allan asked leave to examine a ghatwal who happened to be present at the argument. This we rejected, because an enquiry of so very limited a nature, coming at that stage of the case, could not, we considered, be otherwise than unsatisfactory. The groundlessness of this application becomes further apparent when it is recollected that about a year ago, in cases precisely similar to the present, in which the same plaintiff was appellant, the Court distinctly refused to receive these papers as evidence of anything more than the quality of land then under cultivation. It is impossible to say after this that the appellant was taken by surprise by our decision.

Another application that has been made to us is that we should admit the review, in order that the case may be sent to be argued before a Full Bench on account of the conflict between our decision and that of the other decisions of this Court referred to in our judgment. But any difference that exists is not one of law, but of fact; and it is not the practice of this Court to refer questions of fact to the decision of the Full Bench.

In truth, moreover, this long series of cases which have now been before this Court and the late Sudder Court for eight or nine years, though they have originally many features in common, have been so differently dealt by the parties themselves in their statements and admissions, have been brought up on appeal on such entirely different grounds, and have been supported by such varying evidence, that there is now no distinct identity between them. The conflict upon the decisions of this Court is therefore more apparent than real, even upon the matter of fact. We therefore reject the several applications made on behalf of the plaintiff.

A counter-application for review has been made in all these cases by the Government pleader, who complains of that part of the judgment by which the Government is deprived of costs. It was stated at the argument, and not denied, that the Government was originally made a party to these appeals on its own application. This appears now not to have been the case with regard to the suits actually before us, to which the Government was originally made a party by the plaintiff. The fact is that the Government was made a party to a set of similar suits in 1859, on its own application, by an order of the late Sudder Court; and it was probably in consequence of that order that Government has been made a party by the plaintiff to the present suits also.

Under these circumstances, it can hardly be said that Government is to

blame in having defended these suits. It is true that no relief or decree of any kind is asked against it; but it might not unnaturally be desirous to protect and defend the interests of the ghatwals, who are public servants, and not well able to defend themselves. Government having therefore been made a party to these suits by the plaintiff, we think it ought not now to be altogether deprived of costs.

We therefore, under the altered circumstances now before us, grant the review, in order to correct this part of our judgment, and we direct the appeals to be dismissed as against Government with costs.

At the same time we desire to say that we adhere to our opinion that the Government ought not to have been made a party to these suits. Since the decision referred to of 1859, the Code of Civil Procedure has come into operation, and this Court has recently taken a stricter view of the provisions as to making persons having different interests parties to a suit. We find that precisely the same view was taken by the Chief Justice and Mr. Justice L. S. Jackson in the case of Joy Gobind Doss *vs.* Gouree Pershad Shaha, reported in III. R. C. and C. Reporter, 132. It was there laid down, as a rule, that those persons only should be joined as defendants in a suit whose claims were necessary to be taken into consideration before deciding on the plaintiff's title. We think that the rule is there properly laid down, and that it is of the greatest importance that it should be strictly adhered to. If the Government is desirous of protecting its own interests, or those of the ghatwals, it is scarcely probable that it will find any difficulty in inducing the ghatwals to accept their assistance.

Regular Appeal from East Burdwan.

CASE 35 OF 1867.

27th January.

Khajah Surwar Hossein Khan and another, (two of the Defendants) *Appellants, versus* Shahazadah Gholam Mahomed and another, (Plaintiffs) *Respondents.*

Before *Peacock*, C J., and *Seton-Karr*, *L. S. Jackson*, *Macpherson*, and *Hobhouse*, J. J.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Appellants.
Mr. R. T. Allan and *Baboo Mohendro Lall Shome* for Respondents.

This case was referred to the Full Bench, on the 14th August, 1867, under the following orders recorded by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson.

Macpherson, J.—On the 9th December, 1855, Khajah Ali Hossein executed a kistbundee bond in favor of his daughter, the respondent, Hazerah Begum, to secure the payment to her of Rupees 10,250. The bond says :—"I have no means of discharging the said debt by one payment. Therefore, having paid Rupees 250 in cash, I execute a deed of instalment for the payment of the balance of Rupees 10,000, with the following stipulation :—That I shall pay from 1856 to 1861 at the rate of Rupees 1,500 annually, and in the year 1862 I shall pay Rupees 100, and after having repaid the said amount in full, I shall take back the deed of instalment." And by way of further security, and "in order to ensure the payment of the said amount," the landed property, the subject of the present suit, was charged with the payment of the debt (by way of simple mortgage). It was further stated in the bond—"in default of payment of the said amount, agreeably to the terms of this deed of instalment, I shall pay interest at the rate of Rupees 10 per thousand per mensem."

Where there is an unregistered bond to secure the payment of a sum of money, with interest, by which bond lands also are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that the lands are charged with the payment, and for an order for sale of the lands in satisfaction of the debt, must be brought within twelve years of the cause of action.

On the 2nd September, 1862, Hazerah Begum instituted a suit for the recovery of the instalments which fell due in the years 1859, 1860, and 1861, and she obtained a decree, on the 8th April, 1863, against the representatives of Khajah Ali Hossein, who had died before the suit was commenced. On appeal, this decree was upheld by the High Court on the 4th of March, 1864.

On the 28th July, 1863, Hazerah Begum got a decree in another suit for the instalments which fell due in 1862. This decree was, on appeal, affirmed by the Zillah Judge on the 19th August, 1864.

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Both these decrees were simply decrees for the payment of a certain sum of money out of the estate of Khajah Ali Hossein, deceased. Neither of them alluded to the fact that, by the bond, the lands now in dispute were pledged to secure the money due; neither decree contained any declaration that the lands were subject to a charge for the payment of the instalments, or that they were to be sold in satisfaction of the decrees.

In November, 1864, Hazerah Begum, apparently, after an ineffectual attempt to recover what was due to her under these decrees, assigned them both to Shahanee Begum, who has since died, and is now represented by the plaintiffs in the present suit.

In execution of the two decrees, the plaintiffs attached the mortgaged property, and were proceeding to have it put up for sale, when the appellant, Nunee Bibee, on behalf of her minor children, (being the persons chiefly interested in the estate of Khajah Ali Hossein) claimed the property, alleging that the attachment was bad, as the decrees did not declare that the property which had been attached was charged with the debt, and as by a towleeutnamah, dated the 27th December 1859, Khajah Ali Hossein had settled the property as *wuqf*, appointing his grandson, the minor appellant, Syud Ali Hossein, the mutwalee of the endowment The claim was considered to be good, and the property was released on the 5th September, 1865.

On the 21st December, 1865, the present suit was instituted. Its object is to obtain a declaration that the property mortgaged by the kistbundee bond is charged with the amount which is due under the two decrees; and that being so charged, the plaintiffs are entitled to have it sold in execution of the decrees, notwithstanding the towleeutnamah or any other title which may be pleaded of date subsequent to the Kistbundee.

The Lower Court has held that there is no doubt as to the execution of the towleeutnamah, or as to the property having become *wuqf* by reason of it. But the Court held that the mortgage took precedence of the subsequent settlement, and ordered that the property should be sold in satisfaction of the decrees.

The defendants appeal. They do not deny now that the towleeutnamah must be taken to be subject to the mortgage, so far as the mortgage can now be enforced; but it is contended—

Firstly.—That as Hazerah Begum assigned merely her right and interest in the two decrees, the plaintiffs cannot proceed under the mortgage which was mentioned, neither in the decrees, nor in the assignment under which the plaintiffs claim; and—

Secondly.—That the suit is barred by limitation as regards the amount due under the first decree.

By way of cross-appeal, Mr. Allan, for the plaintiffs, has argued that the towleeutnamah is void absolutely as against the plaintiffs, whether the mortgage is barred by limitation or not. He argues that, even supposing the plaintiffs are entitled to nothing more than what any person, holding an ordinary decree against the estate of the deceased Khajah Ali Hossein, is entitled to, this towleeutnamah cannot prevent the property being sold to satisfy the decrees, inasmuch as, according to Mahomedan law, all the property of the deceased is in the hands of his heirs charged with the payment of his debts.

It is enough for me to say that this point never was raised in the Court below, and that, in the absence of any evidence as to Khajah Ali Hossein's position, as regards his being in embarrassed circumstances or otherwise when he made this towleeutnamah, I know of nothing in the Mahomedan law which would justify me in holding that the towleeutnamah is not good against an ordinary creditor holding a common money decree.

As regards the first point raised by the pleader for the appellants, I think that the plaintiffs have a right to enforce all the securities to which Hazerah Begum herself could have had recourse in order to recover her money. Moreover, Hazerah Begum is a party to the present suit, and has filed a written statement declaring all title in herself, and stating that she has transferred all her

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interests in the subject of the suit to Shahanee Begum, through whom the plaintiffs claim.

The second objection is less easily disposed of. All the instalments which were included in the first decree fell due more than three years prior to the institution of the present suit. In other words, the cause of action in the present suit, so far as it relates to the instalments for 1859, 1860, and 1861, arose more than three years before the commencement of this suit. The Kistbundee not having been registered, the appellants contend that the case falls within Clause 10, Section 1 of Act XIV of 1859, and that the period of limitation is three years.

There are two decisions of this Court which are directly in favor of this contention. (See Parushnath Misser *vs.* Shaik Bundah Ali, II Wyman's Reporter, 151; and Seetul Singh *vs.* Sooruj Buksh Singh, III Wyman's Reporter, 31.) But these decisions conflict with those of the Madras High Court. By that Court, it has been ruled in the case of Chettee Gaundun *vs.* Sundaram Pillai, II Madras Reports, 51 (per *Phillips* and *Holloway*, J. J.,) and in the case of Krishna Ram *vs.* Hachapa Sugapa, II Madras Reports, 307 (per *Scotland*, C. J., and *Trere*, J.,) that a suit such as this is, is in the nature of a suit for the recovery of an interest in immoveable property, within the meaning of Clause 12 of Section 1 of Act XIV of 1859, and that the period of limitation is twelve years.

The point is one of some difficulty; and as it is one which frequently arises, and on which this Court is in direct conflict with the Madras High Court, I think that it ought to be referred to a Full Bench that it may be finally set at rest.

The question is whether, as regards the instalments of 1859, 1860, and 1861, included in the first decree, (of April 8th, 1863, confirmed on appeal, March 4th, 1864,) the present suit is barred by limitation. And, in order to decide this point, the Court must decide whether, when there is an unregistered bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that the lands are charged with the payment of the debt, and for an order for the sale of the lands (as subject to the charge) in satisfaction of the debt, falls, as regards the question of limitation, within the provisions of Clause 10 of Section 1 of Act XIV of 1859, or within those of Clause 12 of that Section. In other words, must the suit be brought within three years from the origin of the cause of action, or is it in time if brought within twelve years.

Seton-Karr, J.—I concur in the propriety of making this reference. Though I do not think that we are bound to refer every case in which a Bench of our Court differs from the Courts of Bombay, Madras, or Agra, yet I think that as the present question is an important one, and as it has been discussed before us several times lately, we required an authoritative ruling on the point.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J., (*Macpherson and Hobhouse, J. J., concurring*)—The plaintiff is the assignee of Hazera Begum, who is the obligee of the bond given to secure to her the payment of Rupees 10,250. The bond was executed by Khajah Alli Hossein, and it stipulated for the payment of the balance specified in the bond by instalments. It is found, in the case which is submitted for our opinion, that, by way of further security, and in order to ensure payment of the amount, the landed property, the subject of the present suit, was charged with the payment of the debt by way of simple mortgage.

Several suits were brought to recover the instalments; but in proceeding to enforce the decrees against the land in question, a *wuqf* was set up as having been executed by Khajah Ali Hossein, by which the property was vested in a mutwallee free from the charge which had been created by the bond. In consequence, on the 21st December, 1865, a new suit was brought, for the purpose of declaring that the instalments which fell due upon the bond in 1859, 1860, and 1861 were included in the decree of 8th April, 1863, which was affirmed on

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appeal, and that they were a charge upon the land in question as against the mutwally. The question is whether that suit is barred by limitation or not.

The suit was brought, so far as it relates to the instalment of 1859, after the expiration of six years, as the instalment was payable on the 9th December, 1859, and the suit was not brought until the 21st December, 1865, more than six years after the instalment became due. But it was brought within six years from the date on which the instalments for 1860 and 1861 became due; and we are now asked to decide whether the suit to have the lands charged with the payment of the debt, and for an order for the sale of the lands in satisfaction of the debt, falls, as regards limitation, within the provisions of Clause 10 or of Clause 12 of Section 1 of Act XIV of 1859; in other words, whether the suit ought to be brought within three years from the accruing of the cause of action, or within twelve years.

It appears to me to be clear beyond doubt that this case cannot fall within Clause 10 of Section 1. The suit was brought against the mutwally. The mutwally never entered into any contract with the plaintiff, and was not liable for a breach of contract. The suit was brought against him to enforce payment of the instalments which had been charged upon the land conveyed to him as *wuqf*.

Clause 10 says:—"To suits brought to recover money lent on interest, or for the breach of any contract in cases in which there is a written engagement." It appears to me clear that this is not a suit brought against the mutwally for breach of contract, but that it is a suit to enforce a charge upon land. It does not fall within Clause 10.

The question then arises whether the suit falls within Clause 12, because if it does not, it is a suit not otherwise provided for, and falls within Clause 16. It appears to me that this is a suit to enforce a charge upon immoveable property, and is a suit for the recovery of an interest in immoveable property within the meaning of Clause 12.

I have no doubt that it falls within Clause 12, and not within Clause 16.

The only case which throws any doubt upon it, in my opinion, is the case which has been referred to in III Wyman's Reporter, page 31. But I cannot concur in the view which was expressed in that decision. Mr. Justice Trevor, who delivered judgment, says:—"The words of the law refer, it appears to us, to an interest *residing of right* in the party suing for which he may sue." It appears to me that a charge upon the land is an interest in the party in whose favor that charge is made. It is also an interest for which he may sue. Then, is it an interest in land, or is it an interest in something else? Mr. Justice Trevor says:—"In a suit like that before us, he has simply a lien on the property for the amount of his debt, but he has no interest of right in the property; and in this view the Section of the law cited does not apply. But, again, the security is a mere incident to the bond. The debt acknowledged in the deed signed by the debtor, and to be payable at a certain time, is the principal, and the collateral security an incident, in the transaction. It follows on legal principle that the latter must follow the former, and not the reverse; in other words, the incident must be sued for within the same time with the principal, or the collateral security be declared enforceable against property pledged within the same time as the debt can be declared due by a Court of Justice." I do not know where the legal principles to which Mr. Justice Trevor refers are to be found. There is no such principle in the English law. If land is mortgaged as security for a loan in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant; and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest.

There are decisions of the High Court at Madras in accordance with the view which I have now expressed, and I concur entirely in those cases.

The appeal will be dismissed with costs.

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Seton-Karr, J.—In this case we have to decide whether the principle laid down by Mr. Justice Trevor in the judgment of the Court reported at page 31 of Wyman's Reporter, Volume III, or that laid down by the Chief Justice of the Madras High Court in page 308, Volume II of Stoke's Reports, is the correct principle. I concurred at the time in the judgment delivered by Mr. Justice Trevor, and thought that the enforcement of a lien on the property by the sale of it in satisfaction of a debt for which it was pledged, could not strictly be termed "an interest in immoveable property, to which no other provision of the Act applies." Mr. Justice Trevor laid it down that the suit was not one for an interest as of right in the property, but one to enforce a mere lien on a property pledged, and to have a sale thereof carried out.

I am further of opinion that nothing that I have heard to-day, in the course of argument or otherwise, satisfactorily explains the inconsistency so forcibly pointed out by Mr. Justice Trevor in that decision, if a suit for a debt due had to be instituted within one certain and defined period, and a suit for enforcing the security of that debt, arising out of the same circumstances, had to be instituted within another period. The anomaly and inconsistency still remain as pointed out. On considering the Sections of the Law of Limitation which are properly applicable to the case before us, I am clearly of opinion, as shown by the learned Chief Justice, that Clause 10, Section 1, is not applicable to the present case. It cannot, by any possibility, be termed a suit for the "breach of contract," as there was no contract between the plaintiff and the mutwally into whose hands the property hypothecated had subsequently passed.

There remains then the only doubt in my mind as to whether it would be correct to say that the case fell under Clause 16, Section 1, and not under Clause 12 of the same Section of the same Act.

It seems clear that, if the present suit had been one not for the sale of the property as merely hypothecated, but for entering on the same property as held under a conditional mortgage, the words of Clause 12 would have been strictly applicable; and looking to the difficulty of drawing a very clear distinction between a suit for entering on a conditional mortgage, and a suit to enforce the mere sale of the property hypothecated, looking also to the opinion which I understand to be that of the majority of the Bench now sitting, I am not prepared to dissent from the principle laid down by the learned Chief Justice on the present occasion, which principle has been also expounded and adopted by the learned Chief Justice of the High Court of Madras, and has been enforced by another Bench of that same Court. I think that if it can be fairly said that the suit is one to enforce any kind of interest in immoveable property, to which no other provision of the Act applies, if that can be fairly stated in interpreting the Act, we need not, and ought not to, have recourse to Section 16 as for a case for which no other limitation is expressly provided, and that we may say that the case is one to which the period of twelve years, from the time of the cause of action, applies under Clause 12, Section 1.

For all these reasons, I am therefore prepared to record my opinion in accordance with that which I understand to be that of all my learned brothers now sitting at this Bench.

Jackson, J.—I concur in the judgment of the Chief Justice.

I am not clear that if the lender of the money in this case had sued to recover the principal money and interest, and at the same time to enforce his lien upon property pledged after the expiration of three years or six years, and before the end of twelve years, he would have been barred.

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CASES 890 AND 854 OF 1866.

Application for Review of Judgment in Miscellaneous Appeal.

Degumburee Dabea, *Petitioner, versus* Eshan Chunder Sein and others, *Opposite Party.*

Baboos Sreenath Dass and *Chunder Madhub Ghose* for Petitioner

Mr R V Doyne and *Baboo Kishen Kishore Ghose* for Opposite Party.

Miscellaneous Appeal from Beerbhoom.

Suroop Chunder Hazra, *Appellant, versus* Troyluckho Nath Roy and others, *Respondents.*

Before *Peacock*, C. J , and *Bayley, Seton-Karr, Phear*, and *Macpherson*, J. J.

Baboo Sreenath Dass for Appellant.

Baboo Juggodanund Mookerjee for Respondents.

A judgment-debtor cannot buy up a decree and execute it against his co-debtors His purchase satisfies the decree, and he can only sue them for contribution.

Case 890 *of* 1866 *was referred to the Full Bench on the* 16*th May*, 1867, *under the following remarks recorded by Bayley and Shumboo Nath Pundit J. J.*

In this case, in execution of a joint decree at the instance of a purchaser of the rights of the decree-holder, the property of one of the joint debtors was sold. That debtor appealed to this Court against the legality of the execution of the decree and of the sale, on the ground that the purchaser of the decree was a benameedar for another joint debtor.

The Lower Court had not tried that allegation, nor enquired into some other material grounds in the case, and therefore we remanded it to the Lower Court with directions to retry those points. We remarked, however, that if the petitioner, appellant, could show the purchaser to be one of the joint debtors, the case need not be further gone into, and the sale should be set aside.

This order was passed because we then held that no joint debtor could legally purchase a decree, so as to be entitled to execute the same against his other joint debtors, in the view that such a purchase was nothing less than a satisfaction or discharge of the debt under the decree, and that only a suit for contribution could be brought against the other debtors by the said purchaser.

In carrying out this order of remand, it was found below that the purchaser was one of the joint debtors.

Subsequently, on review, it was held by us that a joint debtor could legally purchase a decree against himself and others, and at the same time, after purchase, execute this decree in the same way as the original decree-holder.

This order having been passed, the debtor whose property was sold has now asked for a review, on the ground that, under the ruling of this Court dated 10th March, 1862, pages 459-60 of Hay's Reports, Vol. I, a debtor purchasing a decree is entitled to execute it against the other debtors, only after deducting his own share of the liability, and only to the extent of the respective liabilities of each of those debtors.

Now, after hearing counsel on both sides, we first have to admit the review, and admit it accordingly.

We, however, have doubts whether the above decision is correct law. We are inclined to think that when a debtor purchases a decree no law excludes him from exercising all the rights which the original decree-holder possessed.

We may remark that if the original decree-holder had proceeded against one only of the joint debtors under his decree, that debtor would, in order to recover what he may have thus been obliged to pay more than his due share, have had to sue for contribution; and so when the joint co-debtor after purchase proceeds against one debtor, that debtor also would have to sue for contribution.

In the case cited above, the purchaser of the decree had, of his own accord, with a view to avoid litigation, deducted his own quota, and asked in execution for the realization of the remainder only , but it does not follow that in every such case such a purchaser is bound to make such a deduction.

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Further, the conduct of the plaintiff in that case, with reference to the deduction, might have suggested to the Divisional Court the propriety of ruling that if plaintiff has for his own convenience deducted his share of the liability, he should be compelled to be consistent throughout by executing the decree against each debtor only to the extent of his share, and so protect these co-debtors from future litigation.

We observe that the extent of the shares of the joint debtors in that case appears to have been admitted.

We therefore think that that case is special under these circumstances, and we hold that ordinarily it would be far from proper and convenient to receive and enter into and adjudicate upon disputes regarding the extent of liability and means of each co-debtor to pay off his liability. Further, it will not suffice to settle such disputes once only; for in case of the failure of any one of the joint debtors to pay his quota as allotted in the first instance, the Court will have again to re-open and adjudicate afresh on the extent of liabilities and means of the remaining co-debtors and of each of them from time to time, *ad infinitum*, and so on.

Moreover, redress is not withheld at all by the present system. Any party who may be made to pay more than his just share of the debt may sue for contribution, and in that case the general principles of the precedent noted above may reasonably be adopted with advantage. It is to be kept in mind that here the fact of the purchaser being one of the joint co-debtors is denied by the purchaser of the decree and by the purchaser in the sale for execution; and though the Lower Court had found as a fact against this denial, still as the order of remand under which the same finding was arrived at was set aside by us in review, those who deny the identity of the purchaser of the decree with the debtor had no occasion before to contest the correctness of that finding.

They are now, however, of course, at liberty to deny the correctness of this finding; but before any final decision is pronounced in this case, the real facts on this point must, if not admitted, be clearly found in appeal when the necessity for such ground arises.

At present it is only necessary to refer the case to the Full Bench to decide whether the opinion expressed in the decision reported in Hay's Reports, Vol. I, pages 459-60, 10th March, 1862, is correct law; and if it be so, whether, in the case of execution by the joint debtor being taken out against one of the joint debtors for the whole debt, the sale is liable to be reversed.

The point decided by us in the former review regarding the powers of a joint debtor to purchase a joint decree, and to execute it against his co-debtors, was again taken before us in the present review; but it not being shown to us that our subsequent ruling was opposed to any other ruling, or that it was opposed to law, we did not think it proper to admit the objection taken on that ground; but if, in course of trial of the two points of law submitted by us to the Full Bench, that Bench discovers that, without trying that first question, the other two questions submitted by us cannot properly be tried, we would request the Full Bench to try the correctness of our further opinion upon that first question also.

Case 854 *was referred to the Full Bench on the* 21*st May*, 1867, *under the following remarks recorded by Bayley and Macpherson*, J. J.

By consent of the pleaders, this is to be referred to the Full Bench, to be decided with a similar case referred by Messrs. Justices Bayley and Shumboo Nath Pundit on the 16th May, 1867.

Refer accordingly.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J.—(*Concurred in by Bayley*, J.)—In the first case (No. 890) certain plaintiffs sued to enhance the rent of their estate. It does not appear what their respective interests in the estate were. But it appears that they failed in the suit, and were rendered liable for costs. But unless we know the extent of their respective interests in the estate, we cannot say in what propor-

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tion, as between themselves, they were each liable for those costs. One of the persons, however, against whom the decree was passed for costs, unknown to the others, purchased the benefit of that decree against himself and the others in the name of a third person benamee, and then he attempted to issue execution against the others for the whole debt which was due from him and them jointly The Judge held that he had a right to issue that execution.

It is unnecessary for me to go through the several decisions of the Division Bench upon the subject. The last decision was this: that the party who purchased the decree had a right to issue execution against the others; but finding that there was a decision in 2 Hay's Reports, page 459, under which one of several judgment-debtors purchasing a decree against himself and others was declared entitled to execute it against the others only after deducting his own share of the liability, and only to the extent of the respective liabilities of each of the other debtors, the Division Bench referred the case to a Full Bench.

Under Section 208, Act VIII of 1859, the assignee of a decree has a right to issue execution, if the Judge think it just and proper that he should be allowed to do so.

The question then arises, whether it is proper to allow one of several debtors, who had purchased a decree against himself and the others, to issue execution against his co-debtors, and recover from them the whole amount.

The case not being provided for by any specific rule, it becomes necessary for the Court, under Regulation III of 1793, to decide the case according to the principles of justice, equity, and good conscience. The Court must therefore decide whether it is according to the principles of justice, equity, and good conscience to allow one of several debtors under a decree to purchase the decree, and levy the whole amount against his co-debtors. If he could do so, one of nine several debtors, liable amongst themselves to pay eight-ninths of a debt, might purchase the whole debt for one-ninth of the amount of it. If he could levy the whole or even eight-ninths when he had paid only one-ninth as the purchase-money for the decree, instead of having to pay eight-ninths, he would pay one-ninth and put eight-ninths into his pockets, and by that means be a gainer of seven-ninths by the transaction. That would not be according to the principles of justice, equity, and good conscience

Now, having to administer equity, justice, and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.

If the decree had not been sold, the judgment-creditor might, in his discretion, have executed it against the debtor who has now purchased it.

Baboo Sreenath Dass, who argued this case very ably for the appellants, referred to Story's Equity Jurisprudence,* and cited many cases to show that if a man, being one of several debtors, takes an assignment of the debt, he by so doing discharges the debt.

*Paras. 499 (*b.*) (*c.*) and (*d*)

There are also one or two other cases which were not referred to by Baboo Sreenath Dass. One is the case of Reed *versus* Norris, (II Mylne and Craiz, page 361,) in which a son being indebted to his father upon a bond for £1,000 and interest, subsequently joined his father as surety in a bond to Lord Vernon for £500 and interest. A memorandum was endorsed upon the bond for £1,000, by which it was agreed between the father and son that the son should not be called on to pay the principal sum of £1,000 until the father should have paid all principal money and interest due on the bond for £500.

The son compromised the claim of Lord Vernon's executors on the bond for £500, and the question was whether the son's executors could set-off the whole of that debt against the bond.

Lord Cottenham said:—"The question is how far the representatives of

the son, the surety having come to an arrangement with Lord Vernon's executors, by which the bond for £500 has been got rid of and discharged, are entitled, as against the father's estate, to demand more than they have actually paid to Lord Vernon's executors in exoneration of the liability of the son's estate upon the bond for £500.

"Now, if there had been no authority upon this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on the surety? He enters into an obligation, and becomes subject to a liability upon a contract of indemnity. The contract between him and his principal is that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation, together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety then settle with the obligee, and, instead of treating that settlement as payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it as such to the full amount, thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?"

Applying the principle of that case to the present, let us see how it stands. In that case the surety could only recover the amount which he had actually paid. But in this case one of several co-debtors having paid less than the full amount of the debt from the others, at most, he is entitled only to an equal proportion with other debtors of the amount which he paid to get rid of the debt.

The other case is in 2 Young and Collyer's Reports, page 462, (Dowbiggen *versus* Burne) which, I think, is almost a stronger case than the other. A and B as his surety having given a joint and several promissory note to C, the latter brought a separate action against A and B upon the note, and recovered judgment in both actions. C afterwards issued execution upon the judgment obtained against B, whereby B was compelled to pay the whole debt and costs. Upon a bill filed by the administratrix of B for the purpose of obtaining an assignment of the judgment which had been recovered against A, the principal debtor, it was held that such judgment, not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment as sought by the bill.

Mr. Baron Alderson, in giving judgment in the case, said:—"I expressed my opinion on the hearing of this case that the plaintiff could not derive any benefit from the assignment of the judgment against Cowthorne, and that, supposing that to be the case, there was not any ground for the interference of a Court of equity to decree that assignment. The question I desired an opportunity to consider was whether, under the circumstances, there would be any remedy at law, supposing an assignment of the judgment were actually executed to the executors of Mr. Dowbiggen. It is quite clear from the authorities that a surety who pays the debt of the principal debtor is entitled to the benefit of all those securities which the creditor himself could render available

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against the principal debtor. That point was, in effect, determined by Chief Baron Alexander on the argument of the demurrer in this case; and I cannot help regretting that he did not then dispose of the question of law which is now raised, and which was as ripe for discussion seven years ago as it is at the present time

"In this case the assignee, if he obtain an assignment of the judgment, must necessarily proceed in the name of the assignor to enforce that judgment. Now, what are the facts of the case? A joint and several promissory note was entered into by Cowthorne and Doubiggen as his surety. The note when due was not paid, and the payee of the promissory note brought an action, and obtained judgment for the full amount of the note and interest against Cowthorne, the principal debtor; for I think it is fully established that Cowthorne was the principal debtor. The holder of the note having obtained this judgment against Cowthorne, finding that it was not likely to be made available, brought another action, as he was entitled to do, against Dowbiggen, the surety, and recovered judgment against Dowbiggen for the amount of the note and interest. Dowbiggen paid the amount of the principal money and interest due on the note, and the costs of the action against him, and the holder of the note having been thus satisfied the whole of the principal money and interest, had no further claim, except perhaps in respect of the costs of the action against Cowthorne; and if he had afterwards ventured to proceed on the judgment against Cowthorne, the Court of King's Bench, in which the judgment was recovered, would have interfered in a summary manner to stay proceedings on the judgment, except for these costs. The whole effect, therefore, of assigning the judgment to the plaintiff would be to give her that which would be wholly useless, except for the purpose of recovering the costs of the action against Cowthorne, and to which, as administratrix of Dowbiggen, she could not possibly have any right; and that it had been felt that she had no right was evident from the tender to the defendants, the Bournes, of those costs. The case in substance is not distinguishable from the case* before Lord Eldon, in which he says that if a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety paying the bond has a right to stand in the place of the mortgagee; but that if there is nothing but the bond, the surety after discharging it cannot set it up against the principal debtor.

* Turner and Russell, 231.

"It appears to me that any assignment of the judgment would be entirely useless, and therefore, under the whole of the circumstances, I think the bill must be dismissed; but as the Bournes might, I think, readily have given to Mrs. Dowbiggen what she required, though it was perfectly useless, I think the bill must be dismissed against them with costs. There is no ground or pretext for making the surety pay the costs of the principal. The bill must therefore also be dismissed without costs against the defendant Cowthorne.

It appears to me that this case shows clearly that if one debtor satisfies the judgment-debt, and takes an assignment of it, he cannot enforce it by execution, or in any way against his co-debtors. His only remedy is to sue them for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased, having regard to the proportion in which they were bound, *inter se*, to satisfy the original decree. It is said if you do not allow the plaintiff to execute this decree, you will put him to all the inconveniences of instituting a regular suit for contribution. But suppose you do allow him to execute it, you will force the defendants to sue for contribution. It appears to me that that certainly would be a very inconvenient course, and it would lead to a multiplicity of actions, which the law abhors.

It appears to me, upon the general principles of equity, that the debtor in this case having taken an assignment of the judgment, was not entitled to enforce it by execution against his co-debtors.

Then the question arises, what is to become of the sale which has taken place under the execution? We are asked whether the sale ought to be reversed. It appears to me that the creditor who obtained the execution ought not to have the benefit of the moneys realized from the sale under that execution.

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But whether the sale is to be reversed, so as to deprive the purchaser, under the execution, of the benefit of that which he has derived from his purchase, is another question. That is a question which the Court could not decide in the appeal under Section 256. All that the Court could decide under that Section was whether the sale could be set aside, upon the ground of an irregularity in publishing or conducting the sale, not whether execution was granted after the judgment had been satisfied.

Further, it appears to me that an appeal, under Section 11, Act XXIII of 1861, against the order for execution would not affect a purchaser at a sale under the execution, inasmuch as he was not a party to the proceedings. The only way to raise the question between the co-debtors and the purchaser is by a regular suit. Whether the sale can be reversed, as against the purchaser, cannot be decided in this appeal, and we express no opinion upon it.

The case must go back to the Division Bench which referred it for final decision.

The same principles apply to case No. 854, which is the case of a surety.

The last case will go back to the Division Bench which referred it.

Seton-Karr, J.—I am of the same opinion. I was one of the Judges who passed the decision of 1863, recorded in Hay's Reports, as already quoted. On that occasion it appears to have been assumed or admitted without argument that the decree was perfectly capable of execution in some way or other, and the only point that we decided was that, when one of several judgment-debtors purchased the decree, he could not, in execution thereof, realize from any one of them the whole of the debt minus his own share, but that he was, at the most, entitled to recover from each of them his particular quota of contribution to the common debt. After hearing the arguments, I am now prepared to go still further than the above decision, which appears to me correct as far as it went, and on the particular point then raised before us; and I am now prepared to say that the decree, under the circumstances, when purchased by one co-debtor, ought not to have been executed at all, and that the only remedy of the debtor purchaser was to proceed against his co-debtors in a regular suit for their shares of the contribution to the common debt.

I think a decision to this effect, shutting out the execution of the decree altogether, and declaring the debt extinguished as far as the original decree-holder was concerned, is one consonant to equity, to public policy, and to that which should be the aim of our Courts, namely, the avoidance of multifarious and harassing litigation.

As regards the purchaser who is not properly before us, I also concur in the conclusions arrived at by the learned Chief Justice.

Phear, J.—I agree so entirely with the judgment of the Chief Justice, that I do not propose to add anything to it, except so far as to say this, that it seems to me that a money decree may be treated simply as an order of the Court, as between the parties, directing that the one party shall pay to the other a certain sum of money. Execution is merely a process provided for the purpose of securing obedience to this order. Therefore, as soon as payment has been made by the person ordered to pay, there is in one sense an end of the decree, and no further execution can be taken under it. I do think it necessary to go further than that. If that is so, then the moment one of the joint judgment-debtors in the case before us, who was himself bound to pay the whole debt, did satisfy the judgment-creditor by purchasing the decree, and as regards this result it does not matter how many hands the decree had previously gone through, the whole object of the decree was fulfilled, and process of execution ought not to have issued. It is another question how the judgment-debtor, who has in this way satisfied the judgment-creditor, is to get reimbursed by his co-debtors in the event of their declining to do so without compulsion. The obvious course for him to take is to bring a suit against them collectively for contribution.

Macpherson, J.—I also concur in the judgment of the Chief Justice.

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(Final order passed on the 26th February, 1868, by H. N. Bayley and A. G. Macpherson, J. J., in case No. 890.)

So far as relates to the question as to whether execution ought to have issued at all, that point has been decided by the Full Bench in its judgment of the 3rd instant. The original order passed by this Court was right, and the order granting a review of it was wrong. That original order is affirmed, and the appellant is entitled to recover all his subsequent costs incurred in this Court.

As regards the question as to whether there were any irregularities sufficient to vitiate the sale under Section 256 of Act VIII of 1859, the Full Bench decision shows that the original order of remand was not correct. That order is therefore amended; and we direct that the Lower Court do hear and decide the case of the appellant (as originally put forward by him in his petition to the Lower Court) as to the sale being one which may be set aside for irregularity under Section 256.

The Full Bench have decided that the fact that execution ought not to have issued at all on account of the co-debtor having purchased the decree, is not such an irregularity; and that if there were no irregularity under Section 256, then the sale cannot (so far as the purchaser at a sale in execution is concerned) be set aside, except by a regular suit.

(Final order passed on the 27th February, 1868, by H. N. Bayley and A. G. Macpherson, J. J., in case No. 854.)

It is alleged in this case for the appellant that the person who applied for execution really held the decree benamee for one of the judgment-debtors.

The Full Bench has decided in this case (on the 3rd instant) that a judgment-debtor cannot buy up a decree, and then execute it against his co judgment-debtors. If then the facts alleged by the appellants are true, the execution which the Lower Court allow to issue must be set aside.

The case is remanded for decision by the Lower Court on the question of fact. Having ascertained whether or not the purchaser holds benamee as alleged, the Court will pass such orders as may be proper under the circumstances.

CASE 7068 OF 1867.

24th February.

Special Appeal from Backergunge.

Mr. L. T. Lucas, (Defendant) *Appellant, versus* Mr. W. Stephen and others, (Plaintiffs) *Respondents.*

Before *Bayley* and *Phear*, J. J.

Baboos Onoocool Chunder Mookerjee and *Mohinee Mohun Roy* for Appellant.
Mr. C. Gregory for Respondents.

The fact that a special appeal has been preferred in the High Court prevents any party to the suit from having the right of obtaining a review of judgment in the Lower Court.

Phear, J.—The history of this case, by no means exceptional in its character, very well shows what a small amount of finality is possessed by the decree of a Civil Court in this country. The plaintiff, a zemindar, instituted the suit so far back as the 22nd July, 1862, to obtain an enhancement of the rent of an *onsut* talook held of him by the defendant.

The decision of the Deputy Collector (the Court of first instance) was given on the 31st December, 1863. It was appealed against to the Judge. The Judge, on the 3rd June, 1864, remanded the case to the Deputy Collector, with the direction that he should take evidence as to the prevailing rate of rent, and come to a decision as to what was a fair and proper rate.

Against this order of remand the plaintiff appealed specially to this Court, and a Division Bench, on the 9th December, 1864, holding that the Judge's order was improper, sent the case back to the Judge with these words:—"The Judge will retain it on his own file, and proceed to fix a fair and proper rate, referring an issue for a finding to the Lower Court, or taking further evidence and deciding the point without such evidence."

On this remand, difficult of interpretation as it no doubt was, the Judge again entertained the case, and passed his decision on the 17th November, 1865. Upon this the defendant brought the case for a second time to this Court by

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special appeal. The Division Bench, before which this appeal came to be heard, dismissed it on the 27th June, 1866, and one of the learned Judges who constituted the Bench, in delivering his judgment, said with reference to one of the grounds of special appeal then before the Court:—"This I think is no ground for special appeal. It may be a ground—a proper ground—for application to the Judge to review his judgment and to correct the inadvertence, if any. I see no reason why the appellant should not be permitted to apply to the Judge now to make the requisite correction."

The defendants, acting upon this suggestion, applied to the Judge for a review of his judgment upon several grounds, including that which has been presented to this Court as a ground of special appeal, and the Judge, after hearing argument, made the following order:—

"This is an application for review of judgment, on the ground that uncultivated lands had been assessed by the decree. It seems that this is the case, though apparently a mistake. The Ameen deducted certain lands as uncultivated; yet it is now shown that those lands have been included in the assessment. The appeal will therefore be reheard."

A hearing on the admitted review took place accordingly, and the Judge gave his decision on the 21st February, 1867, in these words:—"There has been error, I find, in the calculation. The notice and the plaint mentioned the cultivated lands only, as those he wished to be assessed (8 drs. 8 ks. 18 gs. 1 c. 2 k.) are now shown to be waste, and to have been so for a long time. This amount must therefore be deducted from the total lands to be assessed, as shown in the last judgment. I may remark that this does not give the defendant any right to keep these lands always waste. The plaintiff may, I presume, serve him with another notice concerning those lands; and if he does not choose to bring them into cultivation, and to cultivate them, he should be required to give them up to a more diligent cultivator. I also find I omitted to mention that the rate I fixed, *viz.*, Rupees 29-6 (erroneously written for Rupees 19-6), was calculated in Sicca Rupees, as that is the rate which is shown to have been paid for other lands. With these corrections, the former judgment will stand. The appeal is again decreed in these terms with costs in proportion."

The defendants now appeal specially against this decision, and thus this suit for the enhancement of rent, at the expiration of just five and a half years from the date of its institution, comes a third time before this Court.

The grounds of special appeal are three in number. The first complains that the observation which the Lower Court has recorded in respect of the waste lands are extra-judicial, uncalled-for, and erroneous; the second and third, in effect, object that the Judge did not, at the rehearing in review, properly try the case on its merits.

On the other hand, the plaintiffs, special respondents, raise the preliminary objection that the Judge had no power to grant a review, and consequently that all the proceedings in review were without jurisdiction. They also urge that, even supposing proceedings in review could be legally taken under the circumstances of the case, still the Judge improperly exercised his discretion in admitting the review, because the application was made after the expiration of ninety days from the time when judgment was delivered, and no sufficient cause was shown for the delay.

The force of the special respondents' first objection depends upon the degree of limitation which ought to be given to the words "a decree from which no special appeal shall have been admitted" as they stand in Section 376 of Act VIII of 1859, for it is admitted that the Civil Courts of this country possess no power of granting a new trial rehearing a review of any case once decided by them, except such as is given them by this Section. The portion of the Section which is applicable to a case such as the present, brought, as it was, into the Judge's Court by way of appeal, runs thus when read by itself:—"Any person considering himself aggrieved by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court," (*viz.*, High Court) "and who, by the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by

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him at the time when such decree was passed, or from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." Unless, therefore, the applicant for a review before the Judge fell within the scope of these words, the Judge had no jurisdiction to entertain his application. Then comes the question—Was the decree by which the applicant considered himself aggrieved when he applied to the Court which passed it for a review of judgment, was that decree one from which no special appeal had then been admitted by the High Court? If the word "decree," as here used, is equivalent to "decretal order," the answer must, I apprehend, be in the negative, for the applicant had previously to applying for review himself preferred a special appeal against the order of the Judge which hurt him; in other words, against the whole decretal order, for it was indivisible, and that special appeal had not only been admitted, but had been heard and disposed of. Indeed I don't see how any other meaning than "decretal order" can be attributed to a decree which is spoken of as capable of being appealed against. The only alteration is, that decree may mean the judgment, written or oral, which is delivered to justify the decretal order of the Court; but in this sense it cannot be said to be the subject of appeal; it may be impeached and shown to be erroneous; and in this way an appeal against the decretal order may be maintained. But it seems to me that it would be inaccurate in such a case to say that the appeal was an appeal against the judgment as distinguished from the decretal order. It is said, on behalf of the special appellants, that the effect of Section 376 is to give a party to a suit a right of application for review of judgment upon any ground, whether of law or fact, which has not previously been matter of adjudication in an Appeal Court. This would be so probably if the words "from which no special appeal shall have been admitted" were qualified by the addition of "upon grounds identical with those upon which a review is sought." But in the absence of any qualification like this, I think the mere fact that a special appeal has been preferred and admitted in the High Court against a decretal order of a Lower Appellate Court, prevents any party to the suit, no matter whether or not he be the party who preferred the special appeal, from having the right, under Section 376, of applying to the Lower Appellate Court for a review of the judgment upon which its decree was passed. This construction, no doubt, draws an apparently arbitrary line of division between cases which are otherwise seemingly in all respects alike entitled to the equity of the Section. For instance, there appears to be no assignable reason why, if reviews on the ground of the discovery of new evidence should be allowed at all, they should not be allowed after a special appeal on a point of law has been had, as well as before. The hardship of precluding all opportunity of a review, as well as the equity and justice to be effected by it, is as great in the one case as in the other. But it seems to me that, however harsh the result may be, the words which the Legislature has used will naturally bear only the construction which I have mentioned. This conclusion is, I think, much countenanced by the ostentatious reticence of the Madras High Court in the case of *ex parte* Bashzagarub Wazudar, 1 Stokes, page 254, and is directly supported by a Full Bench of the late Agra Sudder Court in Mussamut Khoorshed Begum *vs.* Syud Hadee Ally and another, S. D. A, (N. W. P.) 1865, page 40. This latter case is singularly parallel with that which is now before us; it had twice come up to the Sudder Court on appeal, and both appeals had been dismissed. But on the occasion of the last of the two appeals, the Judges who dismissed it said:—"We are, however, of opinion that the decision of the Principal Sudder Ameen is open to very grave objections, which we think might fairly be urged in an application to the Court of first instance for a review of judgment. We further hold that as this Court has refused to go into the merits on appeal, a review is not barred on the ground of an appeal having been unsuccessfully preferred by the wording of Section 376 of the Civil Procedure Code." According to this suggestion, a review was applied for and obtained. But on appeal from the judgment on review, it was objected that the review was without the authority of Section 376, and the full Court of four Judges

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held that the objection was valid. The Court said the terms of that Section only authorize a review of a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a superior Court, or of a decree of a Zillah Court, from which no special appeal shall have been admitted by the Sudder Court; and as no exception or distinction is made in regard to cases in which the appeals may have been disposed of otherwise than on the merits, it is inferable that in all cases whatever in which a regular appeal has been preferred on a special appeal shall have been admitted, a review of judgment cannot be granted by the Court of first instance, or the Court of regular appeal respectively." The spirit of this decision, if not the letter, entirely governs the present case.

For the foregoing reasons, I think that the hearing in review from which arose the decree now specially appealed from was given without jurisdiction, and that consequently the decree itself is void.

But even had jurisdiction existed in the Lower Appellate Court to entertain the application for review, I should have considered the admission of it to be an improper exercise of judicial discretion. The application was not made within ninety days, and absolutely no reason was given for the delay. In fact, none could have been suggested under the circumstances of the case other than that, meanwhile the special appeal had been pending. But this, in my opinion, would not be "a just and reasonable cause" for the loss of time, such as the Court to which the application is made is bound to arrive at, under the provisions of Section 377 of Act VIII of 1859, before it can entertain the application at all. To allow such a cause to be just and reasonable would, in truth, contravene the very object for which the opportunity of obtaining a correction of a judgment by review is given, and would exhibit a grave deviation from those principles of guidance which the Privy Cuuncil declared in Moharajah Moheshur Singh *vs.* The Bengal Government should govern every Court in the matter of granting a review of its judgments. I would therefore, on this ground alone, reverse the decision of the Lower Appellate Court, and reject the application for review.

Consequently, whether or not it was within the jurisdiction of the Lower Appellate Court to entertain the application for review, in my opinion the judgment of the Lower Appellate Court, which is now specially appealed against, falls to the ground, and the decree of the 17th December, 1865, which was modified by it, ought to be affirmed.

This decision does not in any way touch the right which I presume to be incident to every Court to correct its formal records in such a way, if needed, as will make them represent truly the decision which was intended to be judicially expressed when the decision was delivered. In this way blunders of the pen may be set right; and if any such exist in the decree of the Lower Appellate Court passed on the 17th December, 1865, it is not too late for that Court to repair them.

In the view which I have taken of the case, I have been led to think that it ought to be disposed of as I have indicated, quite independently of the merits of the defendant's grounds of special appeal. But at the same time I think the matter of his first ground should not be passed by entirely without observation. It does not appear to me to afford reason, of itself alone, for interfering with the judgment of the Lower Appellate Court, had that judgment been otherwise sustainable; still those remarks of the Judge, to which it refers, were so entirely outside the issue which he was determining, and were so injudicial in their character, that I feel bound to say that it is unfortunate they should have been made.

Words like these might have been appropriate enough, had the Judge been the legal adviser of the plaintiff, responsible to him for any mistake of opinion; but amounting as they did to recommendation of future litigation with regard to a disputed right, they seem to me to have been exceedingly unbecoming in the mouth of the presiding Judge of the Appellate Court to which the suit, if instituted according to the advice given, would eventually come. No

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doubt it may sometimes happen that where a plaintiff has mistaken his remedy, a Judge may, without mischief, while deciding adversely to him, also point out to him his right course; but I believe that it will rarely or never be found consistent with strict impartiality that the Court should take the opportunity of delivering a judgment in favor of the plaintiff to tell him how he may win a future cause in the same Court. I think there should be no order relative to costs.

Bayley, J.—I concur in the view that Section 376, Act VIII of 1859, will not allow a review by the Lower Appellate Court in cases decided in appeal here.

I also think no good and sufficient cause is shown in this case for an application for a review not having been made within ninety days. I will only add that it has always been an instruction to subordinate Courts not to advise modes of litigation, although they might, in showing judicially that a party had mistaken his remedy, state also that such party might, *if so advised*, seek for redress under other provisions of the law than those first erroneously looked to.

CASE 2032 OF 1867.

10th March.

Special Appeal from Moorshedabad.

Madhub Chunder Hazrah, (one of the Defendants) *Appellant*, *versus* Gobind Chunder Banerjee and others, (Plaintiffs) *Respondents.*

Before Seton-Karr and *Markby*, J. J.

Baboo Romesh Chunder Mitter for Appellant.
Baboos Sreenauth Dass and *Mohinee Mohun Roy* for Respondents.

Sale by a Hindoo widow with limited rights.

The fact that the next heir attested the deed of sale as a witness, is not conclusive against his subsequent suit to set it aside.

In this case plaintiff, Gobind Chunder Banerjee, the son of Digumburree, and maternal grandson of Seeboo Soondurree, sued, together with one Ramkishore, to set aside a sale of certain landed property made by Seeboo Soonduree whilst she was in possession of the property, and had in it the interest of a Hindoo widow whose husband had died leaving no male issue.

The defendant was an infant whose ancestor had purchased the property in question, and who appeared by his guardian.

The sale in question was made in the year 1241, thirty-three years ago. The deed recites that the sale was necessary for the payment of Government revenue "and other debts," and the execution of the deed is attested by Digumburee, the daughter of Seeboo Soondurry, as also by one Doorga Dass since deceased, who was then the next heir after the death of Seeboo. The plaintiff was not then born.

The only question before us is whether this disposition of the property by Seeboo Soondurry, who had only limited interest, was valid and binding as against the plaintiff, the next heir.

It was contended below, and has been again contended here, that, inasmuch as the execution of the purchase deed was attested by Doorga Dass, the then next heir, it must have been taken to have been made with his assent, and having been made with his assent, is binding and conclusive as against the present plaintiff.

We are not, however, prepared to go to this extent. We do not consider that this assent is in law conclusive, so as to preclude the necessity of all further enquiry, though we consider that the fact of the two persons most interested in contesting this sale, if it were unnecessary, having been called in to execute the deed is the strongest possible evidence of good faith on the part of the purchaser.

It is true that there is a decision of the late Sudder Court by which it is held that an attesting witness must be taken in a matter of law to be an assenting party to the deed which he attests; but we think the law is there laid down a little too strongly.

See the Decision of 1860, S. D. A., page 625.

The same subject is referred to in a decision reported in VI Weekly

Reporter, page 52. There the Court (Kemp and Seton-Karr, J.J.,) held that the attestation showed acquiescence as a matter of fact upon the evidence, and not as a matter of law.

Upon another ground, however, which has been taken before us, the appeal is, in our opinion, well founded. We think the Judge of the Appellate Court has not taken an altogether correct view of the question of fact which he had to determine.

There is not in this case any question of *onus*, or shifting of *onus*, or presumption; the simple question is whether the defendant has shown, as he was bound to do, that the vendor through whom he claims, in making this purchase, acted in good faith, after making such enquiries as a reasonable man would make, to ascertain that the sale was necessary. If he did this, whether the sale was in reality necessary or not, is not material, the object of the law being as much to protect honest purchasers as it is to protect reversionary heirs; and it being clear that, if a man is to deal with a Hindoo widow for the estate which she holds, he must have some mode of doing so which will render his dealings secure from impeachment by any subsequent taker.

Upon the question of good faith, the fact of Digumburree and Doorga Das having attested the deed is of the greatest possible weight, and we think that if the right question, namely, that of good faith on the part of the purchaser, had been considered by the Judge, he would very likely have thought it sufficient on that point.

Nor do we think that the importance of the fact of the lapse of time has been rightly estimated. In the case referred to, the Privy Council refused to lay down any general proposition as to what proof was required from the purchaser of his good faith; and after pointing out some cases in which it might be fairly expected that the purchaser could give some direct proof upon the point, they proceed to say:—"It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment and apparent acquiescence," by which it is clearly meant that, under some circumstances, the purchaser, or a person claiming through him, may be absolved altogether from showing anything more than the fact of sale under some ostensible plea of necessity made to him long previously by a person who had at the time the management of the property.

With these remarks, we remand the case to the Judge for his re-consideration. In so doing, we do not at all intend to trespass upon the strict rules which have been laid down confining special appeals to matter of law. But there appears to us to have been here a substantial error in the investigation which renders a remand necessary, and the Judge appears to us to have wrongly applied the well-known precedent in Honooman Pershad's case.

If there were an ostensible necessity, such as the payment of Government revenue certainly would be, and if the purchaser acted with good faith and reasonable caution, he ought not to be disturbed after so long a period of possession and acquiescence.

The Judge should re-consider the case from the points of view indicated by us, and pass a fresh judgment.

Special Appeal from East Burdwan.

CASE 2072 OF 1867.

12*th March.*

Meer Hetabooddeen, (Plaintiff) *Appellant, versus* Chowdhry Abdool Sutter and others, (Defendants) *Respondents.*

Before *Seton-Karr* and *Dwarka Nauth Mitter*, J. J.

Baboos Kishen Succa Mookerjee and *Nilmadhub Sein* for Appellant.

No one for Respondents.

Plaintiff sued to obtain possession of lands which he alleged he had purchased from defendant.

This was a suit instituted by the special appellant to obtain possession of certain lands under an alleged title by purchase. The material averments in the plaint were that the defendant No. 1 had executed in favour of the special appellant a bill of sale in respect of the lands sued for, after receiving

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The deed of sale was unregistered, owing, as plaintiff alleged, to the fraudulent act of defendant *Held*, (1) that even if the unregistered deed were inadmissible in evidence, there was nothing in law to prevent plaintiff proving his case by other evidence; (2) but that if he could show that non-registration was the result of fraud on defendant's part, the Court should receive the deed in evidence, the letter of the Registration law notwithstanding.

from him the full amount of the purchase-money agreed upon; that she, the defendant No. 1, had also executed a mookhtearnamah in favor of her husband, defendant No. 2, for the purpose of causing the registration of the said bill of sale; that she had acknowledged the genuineness of this mookhtearnamah before the Sub-Registrar of Deeds and Assurances, when that officer had gone to her house to enquire about its execution, but that afterwards the two defendants, in collusion with one another, repudiated the contract, and refused to give effect to it by making over to him, the special appellant, the possession of the property sold. The Court of first instance, whilst holding that the bill of sale in question could not be received in evidence for want of registration, gave a decree to the special appellant upon the other evidence produced by him in the cause. On appeal, the Lower Appellate Court has reversed this decision, and dismissed the suit altogether, upon the ground that the bill of sale not being admissible in evidence under the provisions of Section 13, Act XVI of 1864, the special appellant could not be permitted to prove his case by any other evidence. We are of opinion that this judgment is erroneous in law. Assuming for the present moment that the bill of sale is not admissible in evidence under the provisions of the law above cited, we do not see why the special appellant should not succeed if he is in a position to substantiate his allegations by other evidence on the record. There can be no doubt that in this country, where there is no such legislative enactment in existence as the Statute of Frauds in England, titles to property have passed, and can still pass, from one person to another by virtue of a contract not reduced to writing There is nothing in the Hindoo, Mahomedan, or Regulation law to invalidate such a contract. As to Section 13, Act XVI of 1864, that Section merely says that the deeds and instruments described therein "shall not be received in evidence in any Civil proceeding by any Civil Court, or acted on by any public officer, unless they have been registered in the manner and within the time prescribed by the Act." But there is nothing in this Section which says that no contract purporting to create or transfer any right, title, or interest in land shall be recognized by the Civil Courts unless the same is reduced to writing. In the absence, then, of any positive legislation on this subject, we must look to those principles of equity and good conscience which the Civil Courts in this country are, by their very constitution, bound to administer on such occasions. So far as these principles of equity and good conscience are concerned, we are of opinion, notwithstanding any objections based upon considerations of public policy that might be urged on the other side, that it would be unjust and unequitable as between the parties to a contract to repudiate its provisions, merely because they have not been reduced to writing. It might be said that the recognition of parol contracts in such cases would open a door to fraud and perjury, and thereby increase the very evils which it was the object of the Legislature to provide against by enacting the Registration law; but be this as it may, it is clear that we cannot arrogate to ourselves the functions of the Legislature by putting a construction upon their words other than that which is warranted by the plain language of the enactment itself. If, therefore, the special appellant in this case had come into Court upon a contract not reduced to writing, and if he had proved it to the satisfaction of the Court by unimpeachable testimony, the Court could not have refused to him the relief he asks for. How then is his title to such relief affected by his relying upon a contract reduced to writing, but not registered for the reasons set forth by him in his plaint? Assuming, as we have hitherto done, that the bill of sale in question is not to be received in evidence, even if the explanation put forward by the special appellant to account for its non-registration is found to be correct, we are aware of no law by which he is to be deprived of the power of proving his case by any other evidence he is in a position to adduce. The only objection that can be raised against such a mode of procedure is that founded upon the rule of evidence by which secondary evidence is excluded when the absence of the primary is not satisfactorily accounted for. We entertain

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grave doubts about the applicability of this rule to a case like the present, in which the primary evidence is not actually withheld, but it is rejected by the Court for reasons of its own. But admitting, however, that the rejection of the bill of sale by the Court itself, on the ground of non-registration, is tantamount to its non-production by the special appellant, there can be no reason why he is not to get the benefit of the exception to the rule in question, by being permitted to show that the document was not registered, not from any fault of his own, but from the fraudulent conduct of his adversaries.

We are, however, of opinion that if the special appellant account for the non-registration of the bill of sale in the manner alleged by him, the document ought to be received in evidence, notwithstanding the provisions of Section 13, Act XVI of 1864. Such a case was never contemplated by that Section, as is evident from the provisions of Act XX of 1866; and although it would fall within the letter of the law, it would be contrary to all the recognized rules for interpreting a legislative enactment to hold that it is governed by that Section, for the respondents will be permitted thereby to take advantage of their own wrong, and thus be enabled to commit a fraud upon the true intent and object of the Legislature. Mr. Justice Story, in his work on Equity Jurisprudence, Volume I, page 735, says :—" Another exception is where the agreement is intended by the parties to be reduced to writing according to the statute (the Statute of Frauds), butit is prevented from being done by one of them. In such a case Courts of Equity have said that the agreement shall be executed, for otherwise the statute designed to suppress fraud would be the greatest protection to it." We do not feel the slightest hesitation in holding upon precisely similar grounds that the bill of sale in question ought to be received in evidence, if the absence of registration is accounted for in the manner alleged by the special appellant. We are also of opinion that, even if the special appellant fail to account for the non-registration of the bill of sale, and the document is consequently rejected as inadmissible, the Court should still permit him to prove that he has performed his part of the contract by paying to the respondents the full amount of the purchase-money as he alleged. It would be opposed to all principles of equity and good conscience to allow the respondents to retain the purchase-money without making over to the special appellant the possession of the property they have already sold to him in consideration thereof, and we are fortified in this opinion by the consideration that, in cases falling within the Statute of Frauds, part performance is recognized as a sufficient ground for relaxing the severity of that enactment, as laid down by Mr. Justice Story in Volume I, page 726, of his work on Equity Jurisprudence already referred to. We reverse the decision of the Lower Appellate Court, and remand the case to that Court to try it with reference to the foregoing remarks. If the special appellant succeeds in making out his case, the Lower Appellate Court will give him a decree, and forward a memorandum thereof to the District Registrar and the Deputy Registrar within whose jurisdiction the property in suit is situated, as laid down by Section 45 of Act XVI of 1864.

Seton-Karr, J.—I concur in remanding the case to the Lower Appellate Court.

It is perfectly true that, under Section 13 of Act XVI of 1864, the deed of sale, not having been registered, cannot be received in evidence in the suit. But the meaning of this Section, and the policy of the law, is certainly not to shut out the consideration of the main issue in such a case, namely, whether or not the plaintiff really purchased the disputed lands from the female defendant for a consideration of Rupees 245.

The very gist of the plaintiff's case is that the deed, though executed, was never registered, because the defendant resiled; and if this be the case, it was never intended that the plaintiff should be wholly excluded from showing that he did perform his part of the contract, that he did pay the consideration money, and that the sale was completed.

The Lower Appellate Court has treated the case as if the mere non-

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registration of the bill of sale (which the plaintiff alleges not to be *his* fault) is quite sufficient to dispose of the plaintiff's title

The case will go back to the Lower Appellate Court to be tried on the principles which guided the first Court, and which appear to me to be substantially correct And if the plaintiff can satisfactorily establish by other evidence the payment of the consideration money, and the execution of the sale, it appears to me that he ought to succeed.

The case is remanded accordingly.

Application for Review of Judgment in Special Appeal No. 243 *of* 1867, *dated* 23*rd June*, 1867.

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CASE 278 OF 1867.

Nobinkishen Mookerjee, (Defendant) *Petitioner*, *versus* Shibpurshad Patuck, (Plaintiff) *Opposite Party.*

Before *Bayley* and *Markby*, J. J.

Baboo Umbica Churn Banerjee for Petitioner.
Baboos Nilmadhub Sein and *Kishen Succa Mookerjee* for Opposite Party.

Where the transferee of a transferable under-tenure has neglected to register his name in the zemindar's sherista, the latter may bring the tenure to sale for arrears of rent, without regard to the rights of such unregistered tenant; but he cannot, without such bringing to sale, or under all circumstances, treat the transfer as a nullity.

Markby, J.—In this case the pleader has applied for a review, on the sole ground that the decision of Mr. Justice Bayley and myself in this case is at variance with the decision of Mr. Justice Kemp and myself in special appeal No. 2104 of 1866 delivered on the 14th of February, 1867.

For my own part, I wish to say that I do not consider it any ground for re-opening a case which has been fully argued, that the diligence of the pleader, which ought to be applied before the decision, has discovered, since the decision, an authority in his favor.

But it may be as well to point out that there is no conflict between the decisions. Both, it is true, are suits by a plaintiff who has purchased a permanent transferable interest to have his title declared as against the zemindar, and in both cases the transfer is unregistered in the zemindar's sherista. But there is this important difference, that in the former case the zemindar had, under Section 105 of Act X of 1859, brought the tenure to sale for arrears of rent, and had himself become the purchaser; whereas in the latter case the tenure had not been brought to sale at all. This is the essential part of the transaction, because it is the necessity of that mode of proceeding which gives the transferee of the tenure his protection. If the zemindar proceed to sell the tenure for arrears of rent, the tenant can deposit the rent, and prevent a sale. On the other hand, the zemindar is fully protected, because, unless the rent be deposited in full, the sale will proceed.

This view of the Regulation and enactments of the Legislature is perfectly consistent with both decisions. The pleader has relied on one expression in the former judgment, in which it is said that "the plaintiff had at that time, as against the zemindar, no right whatever." The expression is a little too strong, but taken with what precedes and follows, the meaning is perfectly clear; that is to say, that a zemindar has a perfect right to bring a tenure to sale for arrears of rent without regard to the rights of the new tenant, while he yet is unregistered. But we never said in that judgment, or intended to say, that, *without bringing the tenure to sale*, the zemindar may, under all the circumstances, treat the unregistered transfer as a nullity.

I think the application for a review ought to be dismissed with costs.

Bayley, J.—I concur.

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CASES 224 AND 317 OF 1867.

Special Appeal from East Burdwan.

Radha Benode Chowdhry, (Plaintiff) *Appellant, versus* Digumburree Dassee and others, (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Mohinee Mohun Roy* for Appellant.
Baboo Bama Churn Banerjee for Respondents.

Miscellaneous Appeal from East Burdwan.

Nund Kishore Dass Mohunt, (Defendant) *Appellant, versus* the Moharajah of Burdwan, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Bayley*, *Seton-Karr*, *Phear*, and *Macpherson*, J. J.

Baboo Umbica Churn Banerjee for Appellant.
Baboos Juggodanund Mookerjee and *Chunder Madhub Ghose* and *Moonshee Ameer Ali* for Respondent.

(*Case* 224 *of* 1867 *was referred to the Full Bench on the* 21*st May*, 1867, *under the following remarks recorded by Bayley and Shumboo Nauth Pundit, J. J.*)

The period of limitation within which a defendant, against whom an *ex parte* decree has been given, must apply for retail counts from the date of *attachment* of his property in execution not from the date of its *sale*.

Bayley, J.—After a reference to the records, and hearing counsel, we are of opinion that the Lower Appellate Court wrongly refused in this case to hear in appeal and adjudicate the pleas of the special appellant, to the effect that the Court of first instance had improperly received the case under Section 119 of Act VIII of 1859 after the limited time fixed by that Section.

We are supported in this view by the following decisions of this Court:—Volume VI, W. R., Act X Rulings, page 54; and page 137, Volume III of R. C. and C. Reporter.

We should ordinarily have remanded the case for retrial with reference to these remarks, but we find that the two decisions quoted above materially differ from each other as to the last date for such application, *viz.*, as to whether it be from date of sale, or from date of other process in execution.

We accordingly lay this case before a Full Bench, that it may decide, with reference to the conflicting decisions cited, from what time or act the period of thirty days allowed for such applications is to be calculated.

Order.—Refer to Full Bench.

(*Case* 317 *of* 1867 *was referred to the Full Bench on the* 31*st July*, 1867, *under the following remarks recorded by L. S. Jackson and Hobhouse, J. J.*)

L. S. Jackson, J.—In this case it appears that the decree was passed *ex parte* against the defendant, and, in pursuance of that decree, plaintiff applied for attachment and sale of the defendant's property. The sale was to have taken place on the 6th April. On that date the defendant appeared and presented two petitions,—one in the Court of the Deputy Collector before whom the execution proceedings were pending, and the other in the Court of the Collector, who represented the Covenanted Deputy Collector in whose Court the decree had been passed.

The petition to the Deputy Collector objected to the regularity of the sale proceedings; and it was stated, I understand, that the proclamation of sale had not been duly issued. The petition to the Collector set forth that the defendant had had no knowledge of the suit, and he applied for a new trial. The Collector refused the application, under Section 58, for that new trial, on the ground that more than fifteen days had elapsed since the attachment of the defendant's property. In appeal, the defendant contends that the Collector's decision is erroneous; and in support of his contention he cites a decision of this Court which is to be found in III, R. C. and C. Reporter, page 137. In that case the learned Judges observe—"We are of opinion that process for enforcing a judgment has not been executed within the meaning of this Section until the proceedings in execution have been brought to a termination by a sale of the property attached." That is the meaning put by these learned Judges on the terms of Section 119, Act VIII of 1859, that Clause being in words precisely the same as those of Section 58 of Act X. The words are:—"If a plaintiff, within fifteen days from the date of the Collector's order; and if a

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defendant, within fifteen days after any process for enforcing the judgment has been executed, or at any earlier period." The opinion therefore of these learned Judges is that a proclamation of sale of the judgment-debtor's property, duly made, would not be a process for enforcing the judgment executed. It appears to me extremely doubtful whether that is the meaning of the words cited. I should have rather supposed that the law intended to allow the defendant fifteen days after he shall have been apprised, by the execution of some writ upon his person or his goods, of the decree which had been passed against him. That is the view taken by another Bench of this Court, to be found at page 15, II Weekly Reporter, Act X Cases. The learned Judges there say,—"We are clear that, independent of the question of an ordinary review, defendants could claim a rehearing at any time within fifteen days after such steps in execution as must necessarily bring the decree to their notice,—*e. g.*, the seizure of their person or property." If we were to hold otherwise, it would follow that the defendant might raise, successively, a number of objections to the proclamation, or to the sale of his property, and contest these questions in every stage; and finally, when the decision had been given against him, and the sale was confirmed, he might then turn round and, under Section 58, claim a new trial. It appears to me that the Legislature cannot have intended that; but that as soon as execution of some process or writ against the defendant had apprised him of the fact of the decision, he is bound thereupon to apply to the Court within fifteen days for a new trial.

The case has not been fully argued out before us; but we are given to understand that in a similar case this question has been referred for the decision of a Full Bench of this Court. I think therefore that the most convenient course will be to order that this case also should be referred to a Full Bench, in order that the parties concerned in it may have the opportunity of arguing the matter there.

I observe that the view above taken by us is in accordance with two other decisions of this Court. The cases are summary regular appeal No. 76 of 1866, Loch and Macpherson, J. J., decided 6th August, 1866, R. C. and C. Reporter, II, page 164, and Sheikh Gholam Abyah *vs.* Sham Soondur Koomaree, Loch and Macpherson, J. J., R. C. and C. Reporter, III, page 253.

Hobhouse, J.—I concur with my learned colleague in the interpretation which he has put on the words of Sections 58, Act X of 1859, and I concur also in the order by which he directs that this case shall be referred to the Full Bench.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—We are of opinion that, in cases falling under Section 119 of Act VIII of 1859, the application must be made within a reasonable time, not exceeding thirty days after process for enforcing the judgment has been executed. The question is—What is the meaning of the words "within thirty days after any process for enforcing the judgment has been executed;" whether they mean, in the case of property attached, within thirty days after the sale, or simply within thirty days after the attachment.

Mr. Justice Kemp and Mr. Justice Markby have held that they mean within thirty days after the property has been actually sold. If the time runs from actual sale, I apprehend that they must run from the date of confirmation of sale; for until it is confirmed, there is no actual binding sale of the property in execution.

The case which is provided for is the case of decrees passed against a defendant *ex parte*, and the object of the Legislature seems to have been to take care that in the case of an *ex parte* decree the party against whom it is passed may have an opportunity of showing that he had no notice of the suit. The Legislature have fixed thirty days after process for enforcing the judgment has been executed.

The Legislature provided that, before an *ex parte* decree should be given, the Judge should be satisfied that the defendant had been served with a summons.

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Section 111 says:—"If the plaintiff shall appear in person or by a pleader and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex parte*."

The Court cannot pass an *ex parte* decree against a defendant until it is satisfied that the summons has been served; and it is only to provide for the contingency of the Judges being satisfied that the summons has been served when it has not been served, that this provision is made for the defendants coming in and asking to have the *ex parte* decree set aside. If the plaintiff makes a false representation, he would be liable to punishment for perjury, or the fraud would itself vitiate the decree, and the other party might, on the ground of fraud, come in at any time to set aside the decree. But where a defendant is not served with a summons, he may not know of the decree. The first notice he may have of it is when his property is attached in execution.

Section 119 was to provide against the contingency of the defendants not being served with a summons; and it allows him to come in to set aside the judgment within thirty days after process for enforcing it has been executed.

By Section 232 it is provided:—"If the decree be for money, and the amount thereof is to be levied from the property of the person against whom the same may have been pronounced, the Court shall cause the property to be attached in the manner following."

If the property consists "of lands, houses, or other immoveable property, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise." (See Section 235.)

When that notice has been given, the process of attachment has been executed. That is one process of execution. The plaintiff who executed the process is not to sell.

Section 248 declares that "sales in execution of decree shall be conducted by an officer of the Court, or by any other person whom the Court may appoint."

It appears to us therefore, that, as soon as the property has been attached under the warrant of the Court, directing the bailiff to attach it in execution, there has been a process of execution completely executed, and the party wishing to have the *ex parte* decree set aside must come in within thirty days from that time.

If he is entitled to wait until thirty days after the sale has been actually confirmed, then let us see what time he will get.

By Section 246 it is enacted:—"In the event of any claim being preferred to, or objection offered against, the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree, or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding Section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in Section 220."

He might be occupied six months (more or less) doing that. Then he is to proceed under Section 248, and after that there must be a proclamation under Section 249, and the sale cannot take place until after thirty days from the date of proclamation.

Under Section 256, before the Court can confirm the sale, thirty days are allowed for application being made to the Court to set aside the sale on the ground of irregularity; and if no such application be made, the Court shall pass an order confirming the sale; so that the party gets thirty days after proclamation, and thirty days after the sale before confirmation can take place, in addition to any time occupied in consequence of claims to the property. Then, in addition to that, under Section 256, he may come in and represent that there was an irregularity or any other matter, and thus occupy the Court for a considerable

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time; and then, if the construction contended for is correct, he is to have thirty days in addition to all this.

In the order of reference in case No. 317, Mr. Justice Louis Jackson has stated the point so clearly that we cannot do better than give his own words. He says:—"If we were to hold otherwise, it would follow that the defendant might raise, successively, a number of objections to the proclamation, or to the sale of his property, and contest these questions in every stage; and finally, when the decision had been given against him, and the sale was confirmed, he might then turn round and, under Section 58, claim a new trial. It appears to me that the Legislature cannot have intended that; but that as soon as execution of some process or writ against the defendant had apprised him of the fact of the decision, he is bound thereupon to apply to the Court within fifteen days for a new trial."

It appears to us therefore that process of execution is executed, within the meaning of Section 119, when an attachment of the property takes place, and that if the party means to contest the validity of the decree, on the ground that he had no notice of the summons, he must come in within thirty days from that time in cases under Act VIII of 1859, and within fifteen days in cases tried under Act X of 1859.

Both cases will go back to their respective Division Benches for final determination, together with this expression of our opinion.

(Final order passed on the 26th February, 1868, by Bayley and Macpherson, J. J.)

Under the Full Bench decision of the 3rd February, 1868, the date of attachment will be the date from the period of thirty days calculated under Section 119 of Act XIII of 1859.

The case is remanded for decision with reference to the above remarks.

Special Appeal from Sylhet.

5th March.

CASE 1804 OF 1867

Khondkar Kefaetoolla, (Objector) *Appellant, versus* Mahomed Kahel and others, (Plaintiffs), and others, (Defendants) *Respondents.*

Before *E. Jackson* and *Phear*, J. J.

Baboo Debendro Narain Bose for Appellant.
No one for Respondents.

The Judge has no jurisdiction to order Collector to retry a rent-suit, making the intervenor, whom Collector had refused to admit, a party to the suit.

This is a suit for rent. It was brought originally before the Deputy Collector. A third party applied to be allowed to intervene under Section 77 of Act X of 1859, but the application was rejected, and the suit between the plaintiff and defendant was decided on a matter of fact.

On this, the would-be intervenor appealed to the Judge, and the case was remanded to the Deputy Collector, with direction that he should make the intervenor a party, and try the case afresh. This was done, and the Deputy Collector decreed in favor of the plaintiff. The intervenor again appealed to the Judge, who dismissed the plaintiff's suit, and against this judgment the present special appeal is preferred.

It appears to us that the order of remand by the Judge was made without jurisdiction, and therefore void. Everything that has taken place since must fall with it, except so far as the parties have expressly or impliedly agreed to be bound by it. No sort of consent of this kind has been made out, and consequently we declare that the remand order of the Judge, the second proceedings before the Deputy Collector which followed thereon, and the judgment which is now appealed against are all void and inoperative. The original judgment of the Deputy Collector is affirmed. No costs.

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When a Magistrate enquiring into a case triable only by a Court of Session, finds that accused, though capable now of making a defence, was insane at the time of committing the act which would otherwise have been an offence, he must commit him, and draw up a charge in the usual way. No trial can take place while accused is incapable of making a defence.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Murder.

Queen *versus* Ramrutton Doss.

Before *Seton-Karr* and *Macpherson*, J. J.

In this case the proceedings, both of the Deputy Magistrate who committed the prisoner for trial, and of the Sessions Judge who tried him, have been irregular in the extreme.

The prisoner was arrested on a charge of murder. The Deputy Magistrate says:—"When put upon his defence, he was found to be of unsound mind, and therefore incapable of making a defence. A few days after, he was sent to the Sudder Jail, and placed under the observation of Dr. Greene, the Medical Officer, who having then found him sane, he was sent back here for trial." The Deputy Magistrate then states the effect of the evidence of the witnesses who were examined by him as the mode in which the act was done, which was the basis of the charge of murder, and then he continues:—"From the enquiries held by the Police and by myself, I feel myself convinced that the prisoner did strike the deceased a blow on the head; that the blow was the cause of death, and he was insane at the time of striking the blow. Under the above circumstances, I am of opinion that the act of the prisoner, under Section 84 of the Indian Penal Code, does not amount to an offence, and, agreeably to High Court's Circular No 7, dated 18th July, 1867, beg to commit him to the Sessions Court for trial."

The Deputy Magistrate, in fact, in the first instance, proceeded under Section 388 of the Criminal Procedure Code; but coming subsequently to the conclusion, on the evidence of the Medical Officer, Dr. Greene, that the prisoner was then (at the time of his being before the Deputy Magistrate) of sound mind, although he had been insane at the time he committed the act which was charged as murder, he committed him for trial at the Sessions.

In so doing, he acted in accordance with the Circular to which he refers, and so far the Deputy Magistrate was right.

But, strange to say, the Deputy Magistrate wholly neglected to comply with the provisions of Sections 233 and 227 of the Criminal Procedure Code. He drew up no charge, no written instrument declaring with what offence the accused person was charged, and he did not direct the Sessions Court on what charge the prisoner was to be tried. He simply committed him *generally* for trial at the Sessions, leaving it to the prisoner and to the Sessions Judge to find out, as best they might, on what charge the trial was to take place. Anything more grossly irregular than this cannot well be conceived, and the Sessions Judge ought not to have tried the case when the prisoner had not been committed on any charge.

The Sessions Judge in his judgment says:—"The Deputy Magistrate has sent up this case for trial without a specifically drawn up charge, but quoting Sections 302 and 84, Indian Penal Code." It does not appear by what authority the Sessions Judge proceeded to try a prisoner who had not been committed to take his trial upon any particular charge. He did, however, proceed so to try him. And he did so, without himself even drawing up any formal instrument of charge, but simply entering at the commencement of his record of the trial that the charge was "murder under Sections 302 and 84, Indian Penal Code," an entry as to which it is to be remarked that the charge of murder could only lie under Section 302, and not in any possible degree under Section 84.

The Sessions Judge took up the case on the 2nd of October, and examined the witnesses for the prosecution. Being of opinion, from the evidence given by those witnesses, and also from what he himself saw of the prisoner, that the prisoner was then (at the time of trial) of unsound mind, and incapable of making his defence, the Judge properly postponed the trial for one month, and directed that during the interval the prisoner should be carefully watched by the Medical Officer of the station.

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At the end of the month (on the 1st November) the Medical Officer, the same Dr. Greene who had been examined by the Deputy Magistrate, wrote to the Sessions Judge a letter, in which he says :—"After having had Ram Rutton (the prisoner) under my observation for one month, I am of opinion that he is of unsound mind."

On the 21st of November the case came on again before the Sessions Judge, who finally disposed of it on that day.

In his judgment, after referring to his having postponed the trial on the 2nd of October, he says "the Medical Officer, on the 1st November, reported that the prisoner was of unsound mind. His case having been taken up again this day, he is quite incapable of making a defence, talking nonsense at one time, and remaining perfectly silent again." The Judge then, with the concurrence of the assessors, finds that the prisoner did kill one Bhurrut by striking him on the head with a stick, "but that, by reason of unsoundness of mind, he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that therefore he was not guilty of the offence of murder." The Judge continues:—"And the Court directs that the said Ram Rutton (the prisoner) be acquitted, and that, under the provisions of Section 394 of the Code, the said Ram Rutton be kept in safe custody in the Dacca Lunatic Asylum pending the orders of the local Government."

In acting thus the Sessions Judge was entirely wrong. He proceeded under Sections 393 and 394. But these Sections apply only to the case of a person *who, though in a fit state of mind to make his defence at the time he is tried*, was of unsound mind at the time he did the act which, but for the unsoundness of his mind, would have amounted to a criminal offence. Sections 393 and 394 do not apply to such a case as the present, where the prisoner is found to have been insane, not only at the time he struck the blow which caused death, *but also at the time he was being tried.* The Sessions Judge acted rightly when the case was first before him. Believing the prisoner to be then of unsound mind, and incapable of making his defence, he acted under Section 389, and postponed the trial. The course which he ought subsequently to have pursued is that prescribed in Sections 391 and 392.

Section 391 enacts that "whenever any investigation or trial of a case is postponed under Section 388 or Section 389 of this Act, the Magistrate or Court of Session, as the case may be, may at any time resume the investigation or trial, and require the accused person, if detained in custody, to be brought before such Magistrate or Court. Until such investigation or trial is completed, the case shall be considered as pending before the Magistrate or Court of Session," &c. Section 392 says:—"If, when the accused person appears, or is again brought before the Magistrate or the Court of Session, as the case may be, it shall appear to such Magistrate or Court that the accused person is in a fit state of mind to make his defence, the investigation shall proceed, or the accused person shall be put on his trial, as the case may require. If it shall appear that the accused person is still of unsound mind and incapable of making his defence, the Magistrate or Court of Session will act in accordance to the provisions of Section 388 or Section 389 of this Act."

It is quite clear that the matter fell within the last Clause of this Section, and that the Judge should have acted as therein directed. It appeared to the Court of Session, after the first postponement, that the accused person was still of unsound mind and incapable of making his defence, and thereupon the Judge ought to have proceeded under Section 389.

Even if there be practically little doubt that the prisoner is really insane, the Court ought not to have rested satisfied with the letter of Dr. Greene of the 1st of November. It may be that the certificate of the Doctor, that the prisoner was incapable of making his defence, (if that had been its purport) would, under Clause 2 of Section 395, have been evidence of the fact. But that Section does not enact that a mere certificate is to be sufficient evidence of the prisoner's being of unsound mind and incapable of making his defence. On the 22nd of July Dr. Greene had been examined by the Deputy Magistrate, and had

given it as his opinion that the prisoner was perfectly sane and capable of making his defence. And it would have been far more satisfactory if Dr. Greene had been personally examined by the Sessions Judge, as to the reasons which induced him to give an opinion on the 1st of November so directly opposed to that given by him in July.

It appears to us that, under the circumstances, there is no alternative for us, sitting as a Court of Revision, but to set aside the whole proceedings as irregular, and to direct the Deputy Magistrate to take up the case *de novo*, and deal with it strictly as the law directs.

If, when the prisoner is again placed before the Magistrate, he shall appear to the Magistrate to be of unsound mind, and incapable, in consequence, of making a defence, the Magistrate will act in accordance with the provisions of Sections 388, 390, 391, and 392 of the Criminal Procedure Code.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of False Evidence.

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The Queen *versus* Soonder Mohooree.

Before *Macpherson* and *E. Jackson*, J. J.

Mode of framing alternative charges of giving false evidence. The charges must show clearly the statements alleged to be false.

Macpherson, J.—The prisoner has been convicted of giving false evidence in the course of a judicial proceeding. The case for the prosecution is that the prisoner, being examined on oath before a Joint Magistrate on the 10th of August last, made certain statements, and that on being again examined on oath by the same Magistrate on the 24th of the same month, he directly contradicted those former statements.

The following is the charge upon which he was committed, and on which he was tried by the Sessions Judge and found guilty.

"I declare that there is hereby made against the defendant Soonder Moohoree the charge that he, either upon the 10th of August last, by using words to this effect:—'About five gurrees or so of the night I was coming from Nosahi village to my house, when I saw Koti Dulai, Sobhi Dulai, and some eight or ten other people sitting in some jungle at a distance of less than an arrowshot from the path through Kumari village, and about half bowshot from prosecutrix's house. I remained there some two hours sitting. The men all got up, went to the house of the prosecutrix, and afterwards they came out again, but who brought what, I really do not know. After they had been an hour in the house of prosecutrix, these persons came out again to where we were; but who brought what property I did not see,' or a portion of them, or upon the 26th August last, by using words to this effect:—'I have no recollection of what I said in Court upon the last occasion. I was drunk; made so by the Police Darogah. I did not see the defendant Sobhi Dulai upon the night of the theft at all. He lives some distance from my house, and where should I see him. I did not see either Koti Dulai or Baidul Behast upon the night of the robbery. I saw nothing whatever of the theft, and was at home from one gurree of the night. I did not go to or through Kumari village that night,' or a portion of them, in the Court of the Joint Magistrate of Balasore, intentionally gave false evidence in a stage of a judicial proceeding, and that he has thereby committed an offence punishable under Section 193 of the Penal Code within the cognizance," &c.

This is no proper charge upon which to put a man on his trial for giving false evidence. In all such cases the charge should show on the face of it the particular matter in respect of which the charge is made.* No doubt it has been decided by a Full Bench of this Court (in the case of Mussamut Zumeerun, H. R. C. and C. R., 49, Criminal) that there may be an alternative conviction in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code; and it is doubtful which of such offences has been proved. But that case does not decide that a man can be put on his trial on a charge containing only one head, but

* *See* Circular Order No. 3 of 1866, 5 W R, p. 2, Criminal Circular.

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framed in the alternative; nor that a man is in any case properly tried upon a charge which merely sets out two long depositions made by him, which are in some respects contradictory of each other, leaving the person charged to find out for himself, in respect of which particular contradiction it is that he is said to have committed the offence of giving false evidence.

In the present instance the charge ought to have contained several heads, as provided for in Section 242 of the Criminal Procedure Code, and no more of the prisoner's depositions ought to have been set out or referred to than was necessary in order to show the particular contradictions or false statements in respect of which the offence of giving false evidence was charged.

Under the first head the accused might have been charged with giving false evidence in the Court of the Joint Magistrate on the 10th August, 1867, in saying:—"About five gurrees or so of the night (thereby meaning the night of, &c.,) I was coming from Nosahi village to my house, when I saw Koti Dulai, Sobhi Dulai, and others sitting in some jungle at a distance of not less than an arrowshot from the path through Kumari village; they all went to the house of the prosecutrix, (thereby meaning, &c.,) and afterwards they came out again."

Then, under each of the other heads, he should have been charged in respect of some one particular contradiction or false statement thus: Under the *second head*, in respect of the statement made by him before the Joint Magistrate on the 24th of August, 1867, to the effect "I did not see Sobhi Dulai on the night of the theft (thereby meaning the said night of, &c.,) at all;" under the *third head*, in respect of his statement on the 24th August, 1867, to the effect, "I did not see Koti Dulai upon the night of the robbery" (thereby meaning the said night of, &c.); and under the *fourth head*, in respect of his statement on the 24th August, to the effect "I was at home from one gurree of the night" (thereby meaning, &c.)

These four heads would all have related merely to the contradictions appearing on the face of the prisoner's two depositions. And a charge, properly drawn up on the principle I have indicated, would have called the prisoner's attention to the points relied on against him, and would have enabled him to prepare his defence accordingly.

It it were deemed necessary, a fifth head might have been added with respect to what the prisoner said on his second examination, as to his having been intoxicated when first examined. But this would have been a distinct and substantive head of charge, not arising out of any contradiction, but arising out of a statement made by the prisoner, the falseness of which would have had to be proved as a fact by the prosecution; for, for all that appears to the contrary in the first deposition, what he on the second examination said as to his being intoxicated may be perfectly true; and if this part of his deposition were to be set out in the charge at all, it should have appeared as a distinct charge or head by itself.

It by no means necessarily follows that, because a statement made by a person who contradicts a previous statement which he has made, he has therefore committed a criminal offence within the meaning of Section 193.

The circumstances under which, and the intention with which, the particular statement relied on by the prosecution is made, must in each case be carefully considered before it can be held that the prisoner is guilty. In the present instance, supposing the prisoner to have really made the various statements which he is said to have made, I should still hesitate to say he has committed the offence of giving false evidence, when I consider the very peculiar circumstances under which, as appears from the judgment of the Judge, the statements were made. The prisoner and others were arrested on a charge of dacoity. He was offered a conditional pardon under Section 209 of the Criminal Procedure Code, and thereupon made the statements which are recorded in the deposition of the 10th August. After that the offer of pardon was withdrawn; but the prisoner was subsequently discharged from custody. The Magistrate, however, again had him brought before him as a witness in the matter of the same dacoity, and thereupon the prisoner made the statements

which are recorded in the deposition of the 24th of August. I should need much clearer and fuller evidence than that which is to be found in the record before me, (the mere depositions of the 10th and 24th August, and the statement of the Mohurir of the Joint Magistrate's Court that the prisoner did not appear to be intoxicated when examined on the first occasion,) before I should be satisfied of the prisoner's guilt under Section 193. Indeed I have great doubts whether, under the circumstances, the prisoner ought to have been committed for trial at all by the Joint Magistrate, the regularity of whose proceedings in the dacoity case, with reference to the prisoner, seems very questionable.

When a person is put upon his trial on such a loose charge as the charge in this case, and when he is convicted in such a loose and general way as the prisoner has been convicted, it is quite impossible to say that he has really had a fair or proper trial, or that he has not been materially prejudiced by the irregular mode in which the trial has been conducted.

I would therefore set aside the conviction and sentence, and direct the discharge of the prisoner.

E. Jackson, J.—I also think that the prisoner should be released He appears to have been sent in by the Police as a prisoner charged with the offence of dacoity. The record of the dacoity case is not before the Court. But the Sessions Judge in his decision states that the prisoner accepted an offer of pardon, and at once gave a deposition entering into details of the crime. This deposition was made before the Deputy Magistrate, and in it the prisoner stated that he had seen certain individuals commit the dacoity. A few days after, he was again called up to be further examined regarding the dacoity, and he then stated that he knew nothing about the dacoity; that he had been intoxicated with drugs by the Police, and while in that state had given his former deposition; and that he had not seen the persons whom he had previously named commit the crime.

There is certainly no proof that he was drunk or drugged when he gave his first deposition.

Looking to all the facts of the case, my impression is that the prisoner was, as he states, at first induced to make a false statement, but that he took the first opportunity, which he obtained afterwards, to speak the truth. There is no direct evidence to show which of his statements is false, and which is the true statement, and therefore we ought to take the case in the light most favorable to the prisoner, and that view of the case, to my mind, reduces his offence to a minimum.

I concur in acquitting the prisoner. I concur also in Mr. Justice Macpherson's remarks as to the loose manner in which this charge of giving false evidence was drawn up. Those special words upon which the accused is said to have committed the offence should be entered in the charge, and those words alone, and not the whole of the accused's depositions.

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18th January.

SMALL CAUSE COURT AND OTHER REFERENCES.

B borrowed money from A, and pledged first his buffaloes, and then generally his other property asseourity for re-payment B afterwards sold the buffaloes to C. A thereupon sued B, and got a decree against him for the amount due, and attached the buffaloes in execution C intervened, claiming them. A now sues to enforce sale of the buffaloes, or recover the amount of his decree from C.

Held, that the suit being really to ascertain what was due to A on the mortgage deed, and to have his lien on the buffaloes declared to that extent, and to make the buffaloes available for realising that amount, was not cognizable in the Small Cause Court.

Reference from the Judge of the Small Cause Court at Kooshtea.

Ramgopal Shah, *Plaintiff, versus* Ramgopal Shah and others, *Defendants.*

Before *Peacock*, C J., and *Hobhouse*, J.

Case—This is a regular suit, underSection 246 of Act VIII of 1859, brought by the plaintiff to establish his right or lien to the buffaloes mentioned in the plaint, and to obtain a declaration that they are liable in satisfaction of his decree, and there is prayer in the alternative to make the first defendant liable for the amount of that decree under the circumstances mentioned in the plaint, which runs as follows:—

"This is an action for enforcing the sale of seventeen buffaloes in satisfaction of a decree in case No. 791 of 1867 obtained by me, or, in the event of the buffaloes not being available, for the recovery of Rs. 460-6-9 from defendant No. 1, as per account given in the schedule below.

"That the father of defendant No. 2 purchased the buffaloes with capital borrowed from me; but being unable to liquidate the amount when it became due, he executed an ekrar on the 27th Maugh, 1271, pledging the buffaloes and binding himself not to alienate them or transfer his rights therein by any byhebba; and stipulating further that, until the amount of principal and interest due were liquidated, his other property would be liable for the same, provided the amount due be not realized by the sale of the pledged buffaloes in the first instance. Subsequently the defendant having failed to pay off the amount within the stipulated time, I sued defendant No. 2 in this Court, and obtained a decree against him; and on my attaching the pledged buffaloes in execution of the said decree, defendant No. 1 filed a mojahem, alleging that he had purchased the buffaloes on the 4th Pous, 1273, B. S., and the attached property was accordingly released on the 4th September, 1867. The father of defendant No. 2 having pledged to me the said buffaloes long before the execution of the kobala propounded by the defendants, the latter had no right to alienate the same. I am therefore entitled to realize the sum of Rs. 460-6-9 due to me by the sale of the pledged buffaloes, failing which from the 1st defendant, inasmuch as the said defendant purchased and appropriated them to his own use."

Such a suit, under the frequent rulings of the High Court, is clearly maintainable, as the plaintiff obtained a money-decree on the ekrar pledging the buffaloes to him; but the question is, is the present suit maintainable in a Small Cause Court or not?

Only the 1st defendant appeared; and on his behalf it was urged that such a suit is not maintainable in the Small Cause Court, as the relief sought thereby cannot be granted by such a Court.

Now, the Hindoo as well as the Mahomedan law recognized no distinction between mortgages of land and pledges of other property, and the Regulations in no degree recognize any necessity for the mortgagee being put in possession, and all the legislation of the English Government on the subject has proceeded on the basis that mortgages are valid, whether accompanied by possession or not. The late Supreme Court also recognized the validity of, and gave full effect to, Hindoo mortgages, whether accompanied by possession or not. (*See* Macpherson on Mortgages, page 6, and the cases there cited.)

In the ekrar on which the plaintiff obtained a decree, there is a Clause against alienation.

So that any alienation by him or his representatives, in opposition to an express stipulation to the contrary, and a transfer made under such circumstances, is, *ipso facto*, void, or at least voidable; but the late decisions of the Calcutta Court distinctly lay it down that an express stipulation not to alienate property which is mortgaged until the debt with interest and costs are paid off does not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right, or making a second

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18th January.
SMALL CAUSE COURT AND OTHER REFERENCES.

mortgage provided such transfer or mortgage be made subject to the first mortgage (see the same authority, pages 111-116); and there are cases showing that where an assignor wrongfully sold the goods, so that he could not deliver them on demand, the assignee was held entitled to recover their value in trover, even against the *bonâ fide* purchaser. (Cooper *vs* Willmott, 1 C. B. 672; Fenn *vs.* Bittleston, 7 Ex. 152)

It is also laid down in Addision on Contracts, pages 272 and 273:—

"If the mortgage debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired; and if he takes possession, he will subject himself to an action for a trespass. (Brierly *vs* Kendall, 17 Q B 937; 21 Law J. Q. B 161; 16 Jur. 449) But if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession, if he attempts to sell them, or if he becomes bankrupt, and his assignees take them and attempt to sell them, the bailment is determined, the possessory title reverts to the mortgagee, and he may immediately commence an action for the recovery of the goods or their value. (Fenn *vs.* Bittleston, 7 Exch. 152; 21 Law J. Exch 41.) If goods are assigned to the mortgagee upon trust, to permit the mortgagor to hold and enjoy them until default has been made in payment of the mortgage debt, and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagor has the legal right of possession incumbered with the trust as well as the right of property, and may maintain trespass against a wrong-doer (White *vs.* Morris 11 C. B. 1015; 21 Law J, C P. 185) A proviso in a mortgage of chattels that, after default made in payment of the mortgage debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy the mortgaged chattels and to sell and dispose of them, and that until default it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee? The latter is the legal owner, whether in or out of possession (Gale *vs* Burnell, 7 Q B 850)"

The present action may therefore be considered in the light of an action of trover, and such an action is the appropriate remedy where conflicting claims to chattel property call for adjustment Considered in this light, it will clearly be maintainable in the Small Cause Court under Section 6 of Act XI of 1865.

It has also been frequently ruled by the High Court that where a suit is brought to establish a right to property sold in execution, the property sold in execution being moveable, and in value less than Rs. 500, the Small Cause Court alone has jurisdiction in such matters. I therefore think that the prayer for sale may be treated as surplusage, and that the plaintiff is entitled to the other relief sought by his plaint

The registered kabala held by 1st defendant, and dated 4th Pous, 1273, B S., purports to have been granted by 2nd and 3rd defendants alone, and no evidence was offered to show that it was granted for valuable consideration, and without notice; and it appears that the title, if any, acquired thereby is not complete, inasmuch as the other defendants have not joined therein The kobala, moreover, is not made subject to the plaintiff's ekrar, which is of prior date, and the buffaloes mentioned therein were not sold in market overt I therefore, on the evidence adduced by the plaintiff, gave a verdict in his favor for Rs. 438-10-9 with costs Rs 73-15 Total Rs 512-9-9, to be paid by 1st defendant; and I gave him the option to return the buffaloes to plaintiff in order to enable him to have them put up to sale, in which event I made him liable only for the costs of the action No relief was given against the other defendants, as none was sought for

The above decree has been passed contingent on the opinion of the High Court on the following point, *viz* —

Whether the plaintiff's suit as laid is cognizable by a Small Cause Court.

Judgment of the High Court.—It appears to us that this is not a suit to recover personal property, or the value of personal property, but that it is a suit to ascertain what is due to the plaintiff on the mortgage deed, and to have it declared that the plaintiff has a right of lien on the buffaloes to that extent, and to make the buffaloes available for realizing that amount.

If it were a suit to recover the buffaloes, the plaintiff, upon succeeding, would be entitled to a decree to have the buffaloes delivered to him. If it were a suit for the value of the buffaloes, plaintiff would be entitled to recover the full value.

In this suit the plaintiff is not entitled to a decree against the 1st defendant for Rs. 413-10-9, which was the amount due under the mortgage, for the buffaloes may not be worth that sum. It is true that the Judge has given the defendant the option of returning the buffaloes to the plaintiff to enable him to have them put up to sale; but he does not order the plaintiff to sell them and to return to the defendant any surplus beyond Rs. 413 and the costs, nor would he have the power to do so.

If this were a suit for the buffaloes, or the value thereof, then the plaintiff, upon succeeding in the suit, would be entitled to the buffaloes without any condition, or to the full value thereof. This shows that the suit is not cognizable by the Small Cause Court under Section 6 of the Small Cause Court Act.

Reference to the High Court from the Judge of the Small Cause Court at Kishnaghur.

1st February.

Sreenath Banerjee, *Plaintiff, versus* Doorgadoss Nundy and others, *Defendants.*

Before *Peacock*, C. J., and *Bayley*, J.

B promises A Rs. 50 if A will withdraw a suit pending against B in the Civil Court. A does so, and sues B in the Small Cause Court for the Rs. 50. B pleads want of consideration, inasmuch as A's suit in Civil Court was barred by limitation. *Held*, that the Small Cause Court could not enquire into that point, and that B's promise was binding.

Case.—A has a suit pending against B in the Moonsiff's Court. B verbally promises him Rs. 50 to withdraw it. A accordingly withdraws it, and now sues B in the Small Cause Court for the Rs. 50. B admits the promise under the circumstances above stated, but denies that there was a valid consideration for the promise, inasmuch as the suit before the Moonsiff was already barred by limitation. He admits that A performed *his* part of the contract, *viz.*, the withdrawal of the suit.

The questions which I have to propose for the consideration of the High Court are:—

First.—Whether this Court can enquire into the question of limitation in the suit before the Moonsiff, so as to come to a decision on the point whether A's suit was barred or not.

Second.—Supposing this Court to have jurisdiction to make such enquiry, is the withdrawal of a suit barred by limitation, a binding consideration for a promise such as B's.

The first question should, I think, be answered in the negative. Such an enquiry seems foreign to the functions of a Small Cause Court. Supposing the answer set up by B to have been that A would have lost his case on the merits, or that it was a false claim, would this Court have been bound to investigate those pleas? Such a course would be virtually a trial by one Court of a case cognizable (perhaps exclusively) by another. With regard to the second question, I think the promise a binding one. The maxim *ignorantia juris non excusat* seems applicable. Had B actually paid the Rs. 50, he would not be entitled to recover it, on the plea that it was paid under a mistake of law, *viz.*, that he did not know, when paying it, that the claim was barred by limitation.

I have given plaintiff a decree contingent on the opinion of the High Court.

Judgment of the High Court.—We are of opinion that the Judge is right, and that plaintiff is entitled to recover.

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1st February.

SMALL CAUSE COURT AND OTHER REFERENCES.

A suit for balance of indigo advances is one for money lent, or on contract, and is governed by three years' limitation.

Reference to the High Court from the Judge of the Small Cause Court at Kishnaghur.

Mr. H. D. Tripp, Manager for the Bengal Indigo Company, *versus* Kubir Mundul.

Before *Peacock*, C. J., and *Bayley*, J.

Case.—This is an action on the part of the Bengal Indigo Company against defendant for balance of an indigo account.

The account is as follows :—

		Rs.	As.	P.
December, 1859,	account stated	31	10	6
" "	advance for cultivation in 1860 ...	12	0	0
" "	do. for weeding	1	0	0
Date unascertained,	do. for seed	1	6	0
		46	0	6
Deduct value of indigo supplied by defendant in 1860		2	0	0
	Total Rs. ...	44	0	6

The plaint, of which a copy is annexed, states that the claim is for the balance of 1860. Defendant sowed some indigo in that year, and got credit for Rs. 2 as shown above. The plaint was filed on the 18th June, 1864; it was decreed *ex-parte;* but on plaintiff proceeding to take out execution, it was reinstated on the file. Defendant now pleads limitation, and the question submitted to the High Court is—what period of limitation is applicable to the case? It is clearly not governed by Section 8 of Act XIV of 1859; it must come either under Clause 9 or Clause 16 of Section 1. I am in doubt as to which Clause applies, as there are rulings on the subject which have been quoted by both parties in support of their respective views.

Defendant relies on the case of J. Doyle *vs.* Khosal Khan, Sutherland, Small Cause Court References, 121,—a case very similar to the present one. This ruling is quoted and approved in J. Doyle *vs.* Alam Biswas, 4 W. R, Small Cause Court References.

On the other hand, in the case reported in Sutherland, page 145, Doyle *vs.* Edu Gazi, it appears to have been the opinion of the High Court that a case like the present one would be governed by Clause 16.

I am myself of opinion that the weight of authority is in favor of a three, and not a six years' limitation, as far as the first item, Rs. 31-10-6 comprising the account stated, is concerned. Defendant is proved to have been present, and assenting to the balance struck. A contract to pay the money may therefore be implied (Macpherson on Contracts, page 27); and this implied contract is governed by Clause 9, Section 1 of the Limitation Act. The three years' limitation therein laid down of course runs from the date of the adjustment, *viz.*, December, 1859.

The other items for which the suit is brought are advances made, with one exception, (the advance for seed, which was made subsequently to the statement of account, but the date of which is not certain) on the same day that the account was stated. They were for cultivation in 1860. Defendant *did* cultivate something for that year, for he got credit for Rs. 2 worth of indigo delivered in 1860. He did not cultivate after 1860. Plaintiff does not sue for damages on account of defendants not sowing subsequently to 1860. His suit is for balance of account. What limitation is applicable to those items? There is a case reported, Badinath Saha *vs.* Salunnissa Bibee, III Wyman's Reporter, page 15, Part V, which seems exactly in point. The High Court then held that, when money was advanced in payment of goods (partly crops), to be subsequently supplied, Clause 9 of Section 1 was applicable, and that limitation should run from the time when the goods ought to have been delivered. In the present case, as the advances

were for indigo cultivation in 1860, the indigo should have been delivered in that year. I think therefore that defendant's claim to these items is also barred by limitation, the plaint not having been filed till 1864.

Opinion of the High Court.—We are of opinion that this is a suit for money lent, or upon contract, and that three years from the time when the cause of action accrued is the limitation. Under these circumstances, the Judge's opinion, as stated above, is correct.

Reference to the High Court from the Recorder of Rangoon.

1st February.

Sieveking, Droop and Co., *Plaintiffs, versus* C. E. Focke, *Defendant.*

Before Peacock, C. J., and *Bayley*, J.

The Courts of the Recorders of British Burmah have no jurisdiction to receive a suit to have a judgment of the Court of Queen's Bench at home made a judgment of the Recorder's Court for purposes of execution.

Case.—Suit to make a judgment passed against Carle Edward Focke, at the instance and in favor of the plaintiffs in this cause, in the Court of Queen's Bench in London on or about the 27th June, 1867, for £2,612-8-0, and to enforce the said judgment in due form of law within the jurisdiction of this Court by making the said judgment a judgment of this Court.

Plaintiffs pray, *first*, that Carle Edward Focke may be summoned to show cause why the judgment of the Court of Queen's Bench should not be made a judgment of this Court, and failing to show cause, that the said judgment may be made a judgment of this Court against him.

Second.—That the said judgment of Court of Queen's Bench for £2,612-8-0 may be made a judgment of this Court for the equivalent, *viz.*, Rupees 27,865-9-7, for the purpose of execution within this jurisdiction, the defendant having a right, title, and interest in and to the property within this Court's jurisdiction, *viz.*, to second class suburban allotment No. 17, and shipbuilding and timber yard allotment No. 17, situated within this Court's jurisdiction.

Third.—That the defendant be decreed to pay Rupees 27,865-9-7 with interest thereon from date of institution of suit in this Court to date of decree of this Court, and with all costs of suit, and that the total amount of this decree may bear interest to date of realization in full.

As the judgment in the Court of Queen's Bench, on which it is proposed to found this suit, is for a sum of £2,612-8-0 sterling, any appeal against an order rejecting the plaint would lie to the Privy Council, and not to the High Court of Calcutta; and it is to avoid the expense of such a proceeding that I am requested to make this reference.

It appears to me that I have no jurisdiction to entertain this suit, my jurisdiction being conferred by Act XXI of 1863, Section XI, which enacts:—

"The Recorders appointed under this Act shall receive, try, and determine suits of every description, if in the case of suits for land or other immoveable property, such land or property shall be situate; or if in all other cases the cause of action shall have arisen; or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain—within the local limits of the ordinary jurisdiction of their respective Courts. Provided that the Recorders shall not take cognizance of any suit, the cognizance of which, by the ordinary Civil Courts in British India, not established by Royal Charter, is barred by an Act of Parliament, or by any Regulation or Act of the Governor-General of India in Council." This is not a suit for land, nor does the defendant now dwell, carry on business, or personally work for gain within the local limits of the jurisdiction of this Court, nor has the cause of action arisen within those limits.

I request the opinion of their lordships as to whether I have jurisdiction to entertain this suit

Judgment of the High Court—We are of opinion that the learned Judge is right, and that the Court has no jurisdiction to entertain the suit.

MARCH, 1868.

E T. TREVOR, ESQ.

Misprint.

For the word "transfers" at the end of Rule 17A, at page 11 of the Revenue Circulars for March, 1868, read "branches."

No. 8.

With a view to give all parties an opportunity of representing their interests in Butwarrah appeals to the Board of Revenue, it has been ruled that no appeal in any Butwarrah case will, in future, be heard, until after thirty days from the date of the call on the Commissioner for a report on the decision appealed against.

2. Commissioners are requested to issue notices, to be affixed in their own, as well as in the Collectors' Offices, intimating to the parties concerned that a petition of appeal has been presented to the Board on the part of a sharer (to be named), and that the date for hearing such appeal will be fixed on a certain date to be calculated as above.

No. 9.

It has been ruled by the Government of India, in order No. 1084, dated 25th February, 1868, that "native female singers and dancers" should be exempted from the operation of the License Tax Act.

No. 10.

The attention of all District Officers is drawn to Section 15 of Act X of 1862. When deeds, &c., have been executed on unstamped or insufficiently stamped paper, and are brought to a Collector to be properly stamped, or are produced in evidence, the non-intention on the part of the executor to evade the stamp duty should be strictly enquired into, and satisfactorily explained, before orders are passed for the application of the proper stamp, and before the deed, &c., is admitted as evidence. It is to be noted, moreover, that the Collector's authority is limited to the remission of penalties imposed under Clause 1, Section 15, and only then in cases when it has been satisfactorily shown that omission or neglect to execute the deed, &c., on a proper stamp arose from "urgent necessity" or "unavoidable accident."

When penalties are remitted, the ground of remission should, in future, be clearly stated in all certificates granted by the Collector for the application of a proper stamp. Insufficiently stamped deeds, &c., with the Collector's certificate, are, in future, to be transmitted to the Collector of Stamps, Calcutta, and not to the Superintendent, as heretofore.

No. 11.

Notwithstanding the strict orders issued by the Board in their published Rules (*vide* Rule 3, Chapter XXI, Section II, at page 304,) in order to ensure the safe custody of stamps, several instances have recently come to their knowledge of stamps having been destroyed by white-ants, either owing to the omission to provide tin-lined chests or almirahs, or to negligence in omitting to close them properly when so provided. Excuses for neglect in such matters will not be accepted for the future, and Officers in charge of Treasuries will be held accountable for the value of all stamps that may be destroyed, owing to want of proper care and supervision, or disregard of the orders issued.

1-/4

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Calcutta,
1A, HARE STREET,
April 3rd, 1868.

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THE

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AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

VOLUME V.

No. 9.—May 4.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month)

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1868.

17th February.
CIVIL JURISDICTION.

CASE 1817 OF 1867.

Special Appeal from Tirhoot.

Sunker Lall, (one of the Defendants) *Appellant, versus* Juddoobuns Suhaye and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Seton-Karr*, J.

Baboo Debendra Narain Bose for Appellant.
Baboo Chunder Madhub Ghose for Respondents

In a suit to set aside a sale made by a widow without necessity, there was also a plaint for a declaratory decree that a certain bond was not given, as recited therein, for money borrowed by the widow on account of her husband's funeral ceremonies.

Held, that a suit for such a declaration could not lie by itself, and certainly not in combination with other claims as above set forth.

We do not think that in this case the plaintiff is entitled to a declaratory decree that the bond was not given, as recited in the bond, for money borrowed by the widow for the performance of the husband's shradh. It is admitted by the vakeel for the plaintiff that if the bond had not contained any such statement, a suit could not have been maintained for a declaration that the money was borrowed for the purposes of the widow, and not for any purposes binding upon the husband's estates, or upon the heirs of the husband; and it is also admitted in like manner that the recital in the bond that the money was borrowed for the husband's shradh would be no evidence of the fact in a suit against the heirs of the husband, or in a suit to charge the estate In point of law, therefore, the recital sought to be set aside makes no difference as regards the estate of the husband, or as regards the evidence which would be necessary to prove the fact in a suit against the heirs. There is therefore no necessity for a declaratory decree.

This is a case like the case to which appeal No 2542 * relates,—a claim which ought not to have been mixed up in the same suit with claims to set aside sales made by the widow without necessity The decisions of both the Lower Courts must be reversed, and the respondents must pay the costs of this appeal, and the costs incurred by the defendant in both the Lower Courts

*See the following case.

CASE 2542 OF 1867.

17th February.

Special Appeal from Tirhoot.

Rajbunsee Lall, (one of the Defendants) *Appellant, versus* Judoobuns Suhaye and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J , and *Seton-Karr*, J.

Baboo Debendro Narain Bose for Appellant.
Baboo Chunder Madhub Ghose for Respondents.

A suit by reversionary heirs for a declaratory decree that certain property in possession of defendant was purchased by their ancestor through defendant benamee, will not lie.

We think that the suit as to this defendant must be dismissed. The suit was brought by the reversionary heirs to declare that the property standing in the name of this defendant had been purchased by the ancestor in his name benamee. It was a suit for a declaration of right, and not for relief.

If persons choose to purchase property in the names of others benamee, they ought at least to retain sufficient evidence in their own hands to prove that they did so; and there is no reason why the time of the Court is to be occupied for the benefit either of such purchasers or their heirs in making declaratory decrees in their favor.

We think therefore that there is no ground for the Court's making a declaratory decree; and it will be sufficient for the Court to decide what was the real transaction between the parties when the plaintiff seeks for relief.

If an application had been made to the Court in proper time to dismiss the suit as against the present defendant, there would have been ample ground for dismissing it upon the ground of multifariousness, for the plaintiffs are not contented with suing the widow and several purchasers to set aside sales made by the widow under circumstances wholly unconnected with each other, but they have thought it necessary also to add the present defendant, and to ask to have it declared, as against him, that he held other property benamee for the ancestor, and now holds it benamee for them as reversionary heirs.

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The decrees of both Courts will be reversed, with costs of this appeal and the costs in both the Lower Courts.

APPEAL 17 OF 1867.

13th March.

Under Section XV of the Letters Patent.

The Government, (Defendant) *Appellant, versus* Rajah Rajendrokishen Singh, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *L. S. Jackson* and *Phear*, J. J.

Mr. Cowie and *Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Appellant.

Baboos Unnoda Purshad Banerjee, *Onoocool Chunder Mookerjee*, and *Nilmoney, Sein* for Respondent.

Interpretation of Regulation X of 1822. Government cannot separate any tracts in the Garrow Hills from zemindars' estates, save in the Thannahs of Gowalpara, Doobree, and Curribari. Civil Courts may correct unjust survey award. Evidence of the existence of several easements may raise presumption of ownership

Judgment on a preliminary point raised by the Advocate General, to which reference is made in the final judgment in this appeal

We think that the jurisdiction of the Civil Courts of Judicature is not taken away beyond the tract of country comprised in the 2nd Section of Regulation X of 1822.

By Regulation XLI of 1793, certain rules were laid down as to the framing of the Regulations, in order that the Courts of Justice should apply the Regulations according to their true intent and import. One of those rules was that every Regulation should have a title explaining the object of it as concisely as possible; and another, that there should be a preamble to every Regulation stating the reasons for the enactment of it.

Looking to the title and preamble of Regulation X of 1822, it is clear that the rules laid down by that Regulation were to take effect only within the limits described by that Act.

The only limits which we can find described as applicable to the places within which Regulation X of 1822 was to have effect, is the tract of country described in Section 2 of that Regulation, within which the administration of civil and criminal justice, &c., was, by Section 3, declared to be vested in an officer to be appointed by the Governor-General in Council, to be denominated the Civil Commissioner for the North-Eastern parts of Rungpore.

The proviso in Section 8 of that Regulation has been referred to; and it has been contended that, by virtue of that proviso, it is competent to the Governor-General in Council to direct the separation of any tract of country occupied by Garrow mountaineers from the estates of neighbouring zemindars in other parts of the country than those included in the tract mentioned in Section 2. But the proviso in Section 8 is merely a proviso upon the general enactment in the first part of that Section, which is expressly confined to the tract of country placed under the Commissioner, and we can hardly suppose that the Legislature intended, by a proviso upon an enactment limited to that tract of country, to give substantive powers to the Governor-General in Council in respect of other tracts of the country.

Further, it appears to us that Clause 2 of Section 8 did not intend to take away the power of any Civil Court except within that tract of country in which the civil and criminal jurisdiction had been placed in the Commissioner.

We therefore think that the Civil Court has jurisdiction in this case; that the decision of Mr. Justice Kemp and Mr. Justice Seton-Karr was correct; and that the last judgment, from which the present appeal has been preferred, is not subject to the objection taken in the first ground of appeal, *viz*, that the Court had no jurisdiction in the subject-matter of the plaintiff's suit.

Under these circumstances, we think we must proceed to hear the appeal upon the merits.

Peacock, C. J.—This is a suit brought by Rajah Rajkishen Singh against the Collector of Mymensingh on the part of Government. The suit is for a declaration of the plaintiff's right to certain hills, villages, &c., specified in the plaint as part of Pergunnah Shooshung, by setting aside a survey award and

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proceedings, by which, I understand, is meant the boundary of the plaintiff's estate as laid down by the survey, the order of Mr. Campbell, the Officiating Collector of Mymensingh, dated the 15th of April, 1859, and the subsequent orders of the Revenue Authorities.

It appears from the order of Mr. Campbell that, on the occasion of the survey of Pergunnah Shooshung, the plaintiff laid claim to a permanently settled estate co-extensive with that pergunnah; that, owing to that claim, the Superintendent of Survey and other officers were deputed, in 1856, to lay down the boundary of the Rajah's permanently settled estate. Mr. Campbell further states that, from various causes, the expedition proved rather a failure; that some correspondence then passed between the Superintendent of Survey, the Board, and the Government, when it was determined that the clearly defined line of demarcation at the foot of the large hills should be assumed as the boundary of the pergunnah, and that the *onus probandi* should be thrown on the zemindars as to any portion of the hills to which they might lay claim to the north of that line. A line was laid down accordingly, and the case was transferred to Mr. Campbell, Officiating Collector of Mymensingh, for disposal. He upheld the boundary line so laid down by the Survey, and held it to be the extreme limit of Pergunnah Shooshung.

Upon appeal to the Commissioner of Dacca, that decision was upheld on the 19th of November, 1859; and it was also upheld by the Board of Revenue on the 22nd May, 1862, upon a further appeal to them.

The plaintiff filed this suit on the 4th December, 1862. It was originally filed in the Court of the Principal Sudder Ameen of Mymensingh. He held that, in consequence of the order of Government made under Regulation X of 1822, to which I shall have to refer presently, the Government was entitled to separate the land claimed by the plaintiff, and that it must be considered to be within the district of Gowalparah, and beyond the jurisdiction of the Mymensingh Court. The plaint was therefore returned, and it was afterwards presented in the Court of the Deputy Commissioner of Gowalparah, who held that, as the lands in dispute had been made over to the special tribunal appointed by Regulation X of 1822, the Civil Court had no jurisdiction, and he dismissed the claim.

The case was appealed to this Court, and on the 4th August, 1865, Mr. Justice Kemp and Mr. Justice Seton-Karr, for reasons in which I substantially concur, held that the Civil Courts were not ousted of jurisdiction, reversed the decision of the Deputy Commissioner of Gowalparah, ordered the case to be tried before the Judge of Mymensingh upon the merits, and transmitted the case to him for that purpose.

The case was tried by Mr. Simson, who, on the 11th June, 1866, decided in favor of the plaintiff. A regular appeal was preferred from the judgment of Mr. Simson to this Court, which was heard before Mr. Justice Seton-Karr and Mr. Justice Macpherson. Mr. Justice Macpherson was of opinion that the decree of Mr. Simson ought to be reversed with all costs, both in this Court and in the Court below subsequent to the remand order. Mr. Justice Seton-Karr, who was the senior of the two Judges, considered that Mr. Simson's judgment ought to be affirmed substantially, and the appeal dismissed with costs; and in consequence of the decision of the senior Judge, the appeal preferred by the Collector on the part of Government was dismissed with costs.

From that decision an appeal was preferred to the High Court under Section 15 of the last Letters Patent, and the case has been argued before us.

It appears to me that there are four questions to be determined:—

First, whether the boundary line has been correctly laid down; *secondly*, if not, whether we can set aside the proceedings of the survey; *thirdly*, whether the plaintiff is entitled to all the lands which he claims between the line as laid down in the survey map, and what the plaintiff claims as his northern boundary; and, *fourthly*, whether the jurisdiction of this Court has been taken away by the order made by the Bengal Government under Regulation X of 1822.

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As to the last question, the Court has already expressed its opinion, when it was raised by the learned Advocate General, as a preliminary objection. I then expressed the reasons for considering that the jurisdiction of the Court had not been taken away, and I see no reason to change the opinion which I then expressed. It is in accordance with the opinions expressed by Mr. Justice Kemp and Mr. Justice Seton-Karr when they remanded the case.

I would add to the reasons which I then expressed, that the proviso in Section 8 does not authorize the Government to separate any part of the Garrow tract of country beyond that which is described in Section 2 from the district and from the general Regulations, but merely to direct the separation, temporarily or permanently, of any tract of country occupied by Garrow mountaineers from the estates of any neighbouring zemindars, and to discontinue the collection by zemindars of any cesses from such people. But the separation contemplated by that proviso, if carried into effect, would not remove the lands separated from a zemindary, like the tract included in Section 2, from the general Regulations as regards the administration of civil and criminal justice, nor does it authorize the Government to place the administration of civil and criminal justice in the lands so separated from a zemindary in the Civil Commissioner for the North-East parts of Rungpore appointed by Section 3. Such Commissioner is authorized to administer justice only within the tract described in Section 2.

If, therefore, the proviso in Section 8 applied to the separation of lands beyond the district mentioned in Section 2 from the general Regulations, there would be no power to administer justice in the lands so separated, nor any officer authorized by law to administer it. Further, whatever may be the effect of the proviso in Section 8, it is clear that the jurisdiction of the ordinary Civil and Criminal Courts is not taken away, except within the tracts of country mentioned in Section 2.

Clause 2, Section 8 of the Regulation above referred to, enacts that no suit or action shall be entertained by any Civil Court having jurisdiction, or that may hereafter have jurisdiction within the tract of country subject to the authority of the Commissioner, on account of any act of the above description done under the authority of the Governor-General in Council.

Further, upon the removal of any portion of a zemindary under the proviso of Section 8, the Government was to make compensation to the zemindars; but the compensation to be made would be very different in the case of taking away a portion of the estate of a zemindar under that proviso, from what it would be if the right of the zemindar to collect certain cesses only was discontinued.

The jurisdiction of the Civil Courts, by Clause 2 of Section 8, is taken away only with respect to acts of the description above enumerated done under the authority of the Government; but that would not take away the right of a zemindar to contest a survey award drawing a line which takes away from him part of his zemindary, and saying that the lands above that line form no part of his permanently settled estate. That is the ground of action in the present case, and that is not an act of any description mentioned in Regulation X of 1822.

With these additions to the reasons which I expressed in the course of the argument, the opinion will stand as part of this judgment. It is not necessary to repeat it.

I will now consider the first question, *viz.*, whether the boundary line drawn by the survey correctly points out the northern boundary of the plaintiff's permanently settled estate. It appears to me that it does not.

The firmans which have been put in evidence do not show the boundaries of the plaintiff's estate, but they show that the zemindary of Pergunnah Nusruthshahye, otherwise called Shooshung, had been granted to the plaintiff's ancestors by the Native Government prior to the East India Company's accession to the Dewanny. It is not necessary to rely upon these firmans for any purpose beyond that of showing that the estate was co-extensive with Pergunnah Shooshung

It has been shown that the estate called Shooshung was permanently settled with the ancestors of the plaintiff upon a mokururee jumma, and there can be no doubt that the estate, which was settled permanently at a mokururee jumma, was the same estate which was held under the firmans from the Native Government, and was co-extensive with Pergunnah Shooshung.

Indeed, on the sixth ground of appeal to the High Court from the Judge's decision, it is stated that the papers filed by the Government show a settlement was entered into with the Rajah's ancestors for the lands of Pergunnah Shooshung.

The quinquennial register of 1202, which was put in evidence, gives the name of the estate as Shooshung, but does not describe the villages as it ought to have done, according to the provisions of Regulation XLVIII of 1793, Section 7, Clause 5, which enacted that, under the head of each estate, the names of all the pergunnahs, or other local divisions, and the villages contained therein, should be specified.

The first quinquennial register was to be made in the year 1202, B. S., corresponding with the year 1795 of the Christian era, and that was to be numbered 2. Another register was to be formed for the year 1197, corresponding with 1790, which was to exhibit the villages of the estates as they existed at the time of the decennial settlement, and that register, when made out, was to be numbered 1. A third register was to be made out for the year 1207, corresponding with 1800, and every five years subsequently.

The quinquennial register provided by Regulation XLVIII of 1793 was a register of estates. If the estate of the plaintiff's ancestors included the Garrow Hills, it is not improbable that there would be difficulty in giving a description of all the villages included in it in the register of 1202, and probably the description of the villages was left, until further information should be obtained of the state of the pergunnah, as it existed at the time of the decennial settlement, for the purpose of register No. 1. Be that however as it may, it is clear that the register did not comply with the requirements of the Regulation of 1793; but it must be borne in mind that it was the duty of the Collector, who was an officer of Government, to make it out.

Regulation VIII of 1800 repealed the provisions of Regulation XLVIII of 1793, so far as it required the quinquennial register of estates to specify the names of the villages included in them; it required a quinquennial register of pergunnahs in addition to the quinquennial register of estates. That pergunnah register was to give the names of the villages in the pergunnah; and when that portion of the Regulation of 1793 which required the names of the villages to be given in the register of estates was repealed, it was stated that a reference to the pergunnah register would always enable the officers of Government to ascertain the several villages and portions of villages of any estate included in the register of estates. (*See* Section 11, Regulation VIII of 1800.) If the two registers had been properly kept up by the Collectors as required by law, many difficulties, both in this and other cases, would have been avoided.

The first pergunnah register was to be made out for the year 1207, corresponding with the year 1800. Both the register of estates and the pergunnah register were to be made out by the Collector, who had power to call upon the zemindars to give him the necessary information, and the zemindars were bound to do so under a penalty to be inflicted by the Governor-General in Council. The register was to be signed by the Zillah Judge, and a copy sent by the Collector to the Board of Revenue and to the Zillah Courts for information, and the Board of Revenue was to send a copy to the High Court for a similar purpose.

A document was put in evidence which was stated to be a quinquennial register for 1207, and that document contains the names of certain villages as the villages of Pergunnah Shooshung. Up to the close of the argument, I was under the impression that it was the pergunnah register of 1207. If that document had really been a quinquennial register, it would have been strong evidence against the Government, from whose Collector's records it came, that Pergunnah Shooshung contained the villages enumerated in it.

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The Judge, in his judgment in this case, says that the kyfeut of the Collector's Amlah of the time shows that the date of the deposit of the document with the Collector is uncertain, and that it was found at arrangement of the records, which took place in 1224 or 1817. There is nothing to show under what circumstances that kyfeut was written, or what means of knowledge the writer of it had.

Assuming that the document was not a quinquennial register, it came, at any rate, from the Collector's Office, where it has been preserved at least ever since 1817, without any dispute as to its correctness, and is some evidence against Government that the Pergunnah Shooshung did contain those villages. If it had contained a false representation, or was considered so by the Collector at the time, there is no reason why it should have been preserved. Further, the document was treated by the Officiating Collector of Mymensingh in his roobokaree which he sent to the Revenue Commissioner of Assam, dated the 22nd September, 1837, as a document worthy of some credit. He there says:—"In the quinquennial paper of 1207, which specially contains the names of the *paras* or hamlets which are recorded in the first quinquennial papers, the villages of Lekhung and Dano Ryuk, which are the *paras* or hamlets of Mouzah Aghur, and which is recorded in the first quinquennial papers, have been distinctly written." These are on the north side of the boundary laid down by the survey.

I do not think that much importance can be attached to the letter of Mr. Wroughton, the Collector, as to the state of the pergunnah prior to the settlement, for there is considerable ambiguity in his expressions; but we have the letter of Mr. Scott, the Collector, to the Board of Revenue, dated the 24th of May, 1820, in which, with reference to the question as to whether a Canoongoe should be appointed to this zemindary, he evidently considered that the zemindary extended into the Garrow Hills; for he says:—"The introduction of a new system of Canoongoe or Putwarees among them (speaking of the Garrow people) would, I think, be liable to many objections. I am inclined to believe that they pay no fixed rent, either in money or in kind, to their landlord." He certainly did not mean the Government when he used the word "landlord." The word evidently referred to the zemindar. On the other hand, he saw no reason for introducing the office of Canoongoe into that part of the estate which was in the low country.

It appears further that, in the year 1837, a Sub-Assistant was deputed from Gowalparah with a party of sepoys to collect arrears of tribute which had been withheld by certain refractory Garrows. Upon that occasion certain rents were collected from the Garrows for villages on the north side of the boundary line laid down, upon which the Rajah instituted a suit against Government in the Court of the Revenue Commissioner of the Province of Assam; and it appears that, for the purpose of ascertaining whether the villages belonged to the Rajah or not, a rooboocaree was sent from the Cutcherry of the Commissioner of Zillah Gowalparah to the Collector of Mymensingh. An answer was sent by the Collector of Mymensingh to that rooboocaree, in which, as I have before remarked, he referred to the papers of 1207 as a quinquennial register. He stated that "the evidence of witnesses had been taken," and proceeds to state that "from their evidence it appeared that the Mouzahs Lekhung and others are the *paras* or hamlets of Mouzah Aghur recorded in the quinquennial papers; that many other mouzahs are situated in the hills appertaining to the zemindary of the Rajah; and that the hills and mouzahs and kismuts, which are bounded by the Nittie river on the west, Bellei river and the state of the Khashia Rajah on the north, and the river Moheshkhola on the east, are included in the Rajah's zemindary, and he is in possession of them for generations."

A rooboocaree was also sent to the Political Agent for the Cossyah Hills, and Mr. Henry Inglis, the Assistant Political Agent, reported in favor of the Rajah's right to the villages which were under dispute in the Commissioner's Court.

A perwannah was also sent to some neighbouring proprietors on the western boundary, and they replied that they did not claim any portion of the hills.

Finally, on the 17th of March, 1841, the Revenue Commissioner of Assam decided that the order of the Collector releasing Mouzahs Lekhung, Shirkeejhora, and others in question to the possession of the plaintiffs from the claim of Government to realize rents, and allowing a refund to them of the rents realized from those Mouzahs, was, in his opinion, correct.

With reference to this order, Mr. Campbell, in his order of the 15th April, 1859, which is one of the matters impeached in this action, says :—" It is quite true that they," speaking of the Gowalparah authorities, " did argue, and indeed declare, that the hills belonged to the permanently settled Pergunnah Shooshung; but such a declaration can carry no weight, so far as Mymensingh is concerned. They had perfect power to decide that the villages did not belong to Gowalparah ; but no one but the Mymensingh authorities could decide that they were within the limits of the permanently settled estate of Pergunnah Shooshung." But if they are not in the Gowalparah district, and are in the Mymensingh district, are they included in Pergunnah Shooshung ? It is not pretended, on the part of the Mymensingh authorities, that there is any other pergunnah or district, or part of a district, in Mymensingh to the north of Pergunnah Shooshung. This point was very properly pointed out by the Judge in giving judgment on the appeal before him. He appears to me to have given a very sensible judgment on the whole case, and I concur in many of his remarks, though upon one point he appears to have fallen into error, as I shall presently point out. But it is to be further remarked that the decision of the Revenue Commissioner of Assam was given after considering the roobocaree of the Officiating Collector of Mymensingh, dated 27th September, 1837. Of the three officers of Government, the Collector of Mymensingh, the Assistant Political Agent of the Cossyah Hills, and the Revenue Commissioner of Assam, all of whom knew of the proceedings before the Commissioner of Assam, none of them claimed the lands in dispute, and the Revenue Commissioner of Assam ordered the rents which had been collected to be refunded to the Rajah.

Some time after the decision of the Commissioner of Assam, it appears to have been represented to the Board of Revenue that the Rajah was capturing elephants in the forests north of the line which is now laid down, and the Board was asked by the Commissioner of Revenue for the Division of Dacca whether the Government order of the 14th of January, 1854, with reference to catching elephants, was to be enforced in those forests. Mr. Kemp, who was then the Collector of Mymensingh, was directed to enquire whether the forests were situate within or without the limits of the Rajah's permanently settled estate. Unfortunately, in this case, we have not a copy of the whole correspondence. We have sometimes letters without a copy of those to which they are a reply, and sometimes replies without the letters in answer to which they were sent. We have not therefore all the light which might have been fairly thrown upon the case by the Government Officers ; but we find from Mr. Kemp's letter of the 25th of August, 1854, to the Commissioner of Dacca, what was the belief of the Board of Revenue at that time upon the subject; and that was, that the forests where the elephant catching was going on were within the Rajah's permanently settled estate. He says :—" The Board, in reply, observe that if, as they believe, the Rajah's estates (meaning the forests) came within the limits of the permanent settlement, there would be difficulties probably in dealing with the question of elephant catching there, which do not occur in dealing with it in the forests of Sylhet."

Mr. Kemp, who was then the Collector of Mymensingh, reported in substance, as his predecessors had done, that the Rajah's forests were within the limits of his permanently settled estate. We have therefore the opinion of Mr. Scott, the Collector, on the 24th of May, 1820; the report of the Officiating Collector of Mymensingh of the 27th of September, 1837 ; we have the paper, called a quinquennial register, of 1207, upon which no Collector has ever attempted to cast discredit; we have the report of Mr. Henry Inglis, the Assistant Political Agent of the Cossyah Hills; we have the decision of Mr. Jenkins, not only deciding in favor of the plaintiff, but ordering rents which had been

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collected from the Garrows by the revenue authorities of Assam to be returned to the Rajah; we have the report of Mr. Kemp, the Collector of Mymensingh, to the same effect in 1854, and if Mr. Kemp's report is correct as to the Board's reply to the Commissioner of Revenue of the Division of Dacca, of which a copy has not been put in evidence, we have the belief of the Board of Revenue that the forests north of the disputed line belonged to the Rajah's permanently settled estate. Mr. Kemp's letter must have been sent to the Board of Revenue, and there is nothing to show that they ever repudiated the statement that they had expressed that belief. Yet we find, from the decision of Mr. Campbell, on the 15th of April, 1859, that, notwithstanding the Rajah had exercised rights, and collected dues in the hills and forests north of the alleged line, notwithstanding unanimous opinions of all the officers, and even of the Board of Revenue, that the forests were within the Rajah's permanently settled estate, it was determined by the Superintendent, the Board, and the Government, that a demarcation line should be assumed as the boundary of the pergunnah which should exclude those hills and forests from the Rajah's estate; that the *onus probandi* should be thrown on him as to any portion of the hills to which he might lay claim north of that line. The line was accordingly drawn, the case was transferred by the Board to Mr. Campbell, the Collector of Mymensingh, and in an anomalous kind of proceeding of a judicial character, Mr. Campbell decided against the Rajah. His order was affirmed upon appeal by the Commissioner of Revenue, and finally upheld on appeal in a proceeding of a judicial nature by the Board of Revenue, who, contrary to the expressed belief of the Board of Revenue, had ordered the line to be assumed, in order to throw the *onus* on the plaintiff. I must say that the proceeding appears to me, to say the least of it, to have been one of a very arbitrary and anomalous character

On the 23rd of March, 1861, after the decision of Mr Campbell and of the Commissioner, and before the decision of the Board of Revenue of the 22nd of May, 1862, Mr. Seton-Karr, as Secretary to the Government of Bengal, wrote to the Agent of the Governor-General on the North-East Frontier:—

"The specific recommendations made by Lieutenant Morton, in all of which Colonel Jenkins has expressed his concurrence, are as follows:—

First, to extend to the Garrow villages, on the frontiers of the Mymensingh district, the same system of revenue collection as is adopted in the Garrow mehals of the Gowalparah district, or, as Colonel Jenkins expresses it, to take all the Garrow villages from which the zemindars of Sherepore and Shooshung claim to have the right of taking revenue under the direct management of Government, the Government officer collecting the revenue, and paying it over to the zemindars. As this arrangement has worked well in Gowalparah, the Lieutenant-Governor sees no reason to doubt that it would work as well on the other side of the hills, and the Commissioner of Dacca will be requested to adopt measures for its immediate introduction into Mymensingh"

From this paragraph it is clear that the right of the zemindar to collect the revenue was not even disputed by the Government. The Government officer was to make the collections, but he was to pay them over to the zemindar, which would not have been the case if the lands had not been included in the zemindary, and the zemindar had no right to them. Consequently, it seems clear that, when the Commissioner of Dacca was requested to adopt measures for the introduction of the system of revenue collection alluded to in the letter into Mymensingh, it was admitted that this part of the Garrow Hills was in zillah Mymensingh and in the Rajah's estate. This letter was written before the decision of the Board on the appeal.

But after the decision of the Board of Revenue, Mr. Gordon, as Officiating Junior Secretary to the Government of Bengal, writing to the Officiating Commissioner of Assam on the 18th November, 1862, says:—"This is not, the Lieutenant-Governor observes, a question of disputed boundary, but a question as to the right of the zemindars of Sherepore and Shooshung to collect

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revenue from the Garrow villages on the north side of the Mymensing boundary, and within the limits of the Garrow country under the administration of the Deputy Commissioner of Gowalparah. In other words, the lands in the Garrow country in which the revenue was to be collected by Government, and paid over to the Rajah, are now said not to be in Mymensinghat all, but to be to the north of the Mymensingh boundary, under the administration of the Deputy Commissioner of Gowalparah." If so, they are out of the permanently settled estate of the Rajah in Zillah Mymensingh. It has been decided, however, by Mr. Jenkins, the Commissioner of Assam, that they were not in Assam, and he ordered the rents collected to be returned to the Rajah; and then Mr. Campbell held that the Gowalparah authorities, although they had a right to decide that the lands were not in Gowalparah, had no right to decide that, if in Mymensingh, they had been permanently settled.

If they are not in Mymensingh, where are they? The plaintiff's boundary and the boundary of Pergunnah Shooshung are conterminous. If that portion of the estate which is claimed by the Rajah is not in Pergunnah Shooshung, it is not in his permanently settled estate; and if, by the assumed line drawn by directions of the Board of Revenue and the Government of Bengal, the lands are put out of Pergunnah Shooshung, they are at the same time put out of the permanently settled estates of the Rajah; so if the lands are put out of Zillah Mymensingh, they are necessarily put out of the Rajah's permanently settled estate, which was settled with him in Pergunnah Shooshung, Zillah Mymensingh.

In the 3rd paragraph of the letter to which I last referred, it is said:—"The Lieutenant-Governor is not aware that there is any doubt as to the exact boundary between the district of Mymensigh and the Garrow country. But, be that as it may, His Honor directs that all lands to the north of the boundary, as laid down in the Revenue Survey map, may be separated from the estates of the zemindars of Sherepore and Shooshung, and managed by the Deputy Commissioner of Gowalparah, as directed in Section 8, Regulation X of 1822"

When the plaintiff commenced his suit to try the question whether the line of boundary, as laid down in the survey map, was correct, it was contended that the Civil Courts had no jurisdiction. If not, the line assumed by the Board of Revenue, and laid down as the northern boundary of Zillah Shooshung, can never be disputed, and the plaintiff must be bound by the decision of the Board of Revenue, who, having ordered the line to be assumed for the purpose of throwing the *onus* on the Rajah, decided, in their capacity of the highest Court of Appeal in revenue matters, that the line which had been assumed was the correct one. Even if the Government had had the power, under Regulation X of 1822, to separate any portion of the plaintiff's estate from the remainder, and to place it under the Commissioner of Gowalparah, the plaintiff would have been entitled to compensation under the Regulation. But the amount of compensation might be very different if the Rajah were the owner of the soil as part of his permanently settled estate, from what it would have been if he were merely entitled to some incorporeal rights over it.

I do not understand under what Regulation the proceedings of the revenue authorities can be, or are attempted to be, justified. If those proceedings were adopted under Regulation IX of 1825, Section 5, Clause 12, they were wholly irregular, inasmuch as the *onus* of proof was thrown upon the Rajah, not by an independent opinion of the Collector, but by an act done in which the Board of Revenue took the initiative. Having ordered the line to be assumed and drawn as it was, they sent the case to the Collector for disposal. If the lands are in Gowalparah, how could the case be sent to the Collector of Mymensingh? It is not necessary that the proceedings should be regular in order to give the Civil Courts jurisdiction to set them aside. The more arbitrary and irregular the proceedings, the more necessary is the interference of the Civil Courts to prevent them from working injustice. The form of a proceeding, in its nature judicial, was gone through; and if wrong,

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the irregularity of the proceedings can be no ground for excluding this Court from examining them. If the proceedings had been regular, this Court would have had jurisdiction. That jurisdiction cannot be excluded by the irregularity of them.

We therefore have power to look into the facts, and to decide upon the plaintiff's rights. Judging from the parol evidence which has been adduced in the cause, the opinions expressed by the various Collectors of Mymensingh, and the decision of the Revenue Commissioner of Assam, we are of opinion that the line assumed and laid down in the survey map was not correct.

There can be no doubt, from the parol evidence, that some rights were exercised by the zemindar in portions of the forests and lands much to the north of the assumed line. Whether the payments which he received from the Garrows for the Shungs are to be considered as payments of rent or not, I think it is clearly proved that payments of some kind were made to the Rajah by the Garrows in respect of the Shungs and other matters.

There can be no doubt that when the revenue authorities of Assam interfered, and, accompanied by sepoys, compelled payment from the Garrows, such payments were claimed and received as rent. Having been received as rent, the amount was ordered by the Revenue Commissioner of Assam, in a suit by the Rajah against the Government, to be paid to the Rajah.

The cutting of timber would be strong *primâ facie* evidence of an act of ownership. If it were in the exercise merely of a right to cut timber, how did the latter right originate, and who are the owners of the soil over which such right was exercised? One question is whether the acts done by the Rajah and his ancestors on the north side are to be treated as mere unwarrantable encroachments by a wrong-doer, or to be taken as the exercise of rights; and if they are to be attributed to the exercise of rights, whether such rights were rights of ownership in the soil, or mere incorporeal rights over the soil of another.

In a case of disputed boundary, if you find a man exercising rights of ownership on the one side, and on the other side of the disputed line of boundary doing, without objection, acts which may be attributed either to ownership or to the exercise of incorporeal rights, such as the right to cut timber and other rights of that nature, they must, I think, be *primâ facie* attributed to ownership, especially when, as in the present case, the rights exercised are all which, according to the nature of things, an owner would, or probably could, exercise, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was ever made during a long course of years. They certainly cannot be treated as the mere encroachments of a wrong-doer, without showing that some one else was the owner of the soil, and that he objected. There can be no doubt that the Government permanently settled some lands with the Rajah's ancestors. The boundary only is in dispute. We find the Rajah and his ancestors for a long course of years doing acts which may be attributed either to ownership or to the exercise of incorporeal rights on the north side of the disputed boundary line. It is not shown that the Government or any other person ever objected to such acts.

I cannot, in the absence of all evidence to the contrary, attribute those acts to anything but to ownership, and I am of opinion that the Rajah has proved that the line laid down in the survey map was not correct, and that his permanently settled estate includes lands much to the north of that line, and I am opinion that the plaintiff ought to have a declaration that he is not bound by the line so laid down as the boundary of his estate.

In the course of my remarks on the second question, I have indirectly given my opinion on the third point, *viz.*, that this Court has the power to set aside the survey proceedings, although they were irregular. But it does not follow that, because the plaintiff is entitled to lands to the north of the boundary line laid down, he is entitled to all the lands up to the line which he claims as his northern boundary. The Judge of Mymensing has, in my opinion, fallen into an error in deciding that, upon the evidence, the plaintiff is entitled to the

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lands up to the boundary line which he contends for. He has not merely declared that the line drawn by the survey authorities is not the northern boundary of Pergunnah Shooshung, but he has proceeded to declare that the right and title of the plaintiff in the land claimed is established; that is to say, that he is entitled up to the hills lying to the north of the villages Aboollgiri and Sonsengiri. There is no sufficient evidence to prove such a right, or to enable us to declare with certainty what is the correct boundary of the plaintiff's estate.

Mr. Justice Seton-Karr also seems to have fallen into an error similar to that of the Zillah Judge. He—says "Even if it be conceded for Government that the Rajah has not shown, by precise documentary evidence, that this hill tract actually formed part of the assets of his estate at the perpetual settlement, I would still say that he has shewn a prescriptive right to collect and receive tribute from the tract in question, and that the Government, in opposition to the case which he has set up, has shewn literally nothing to debar him from the future exercise of those rights."

But that is not what the plaintiff claims. He does not merely claim certain incorporeal rights over the lands to the north of the line laid down in the survey map, but he claims to be entitled to the lands up to the northern boundary described in his plaint as part of his permanently settled estate, and it appears to me that he has failed in proving his case to that extent. Mr. Justice Seton-Karr proceeds:—"I would simply confirm the judgment of the Lower Courts, and declare the Rajah entitled to the privileges and dues which he has always enjoyed till a recent date. It is obvious that the collection of these cesses, however primitive, irregular, and uncertain, may form an important part of the plaintiff's income. Dealing with the case as a judicial tribunal ought to deal with it, I have only to say that I think the judgment ought to be affirmed substantially, and the appeal dismissed with costs."

It appears to me that Mr. Justice Seton-Karr, although right in other respects, has fallen into a mistake in declaring that the plaintiff is entitled to the lands as part of his permanently settled estate, merely because he considers that he has a right to the privileges and dues which he has enjoyed. I am of opinion, therefore, that the decision of the Zillah Court and of the Division Bench ought to be modified, and that it ought to be declared that the line laid down by the survey as the northern boundary of the plaintiff's estate is not the correct boundary line, and that the plaintiff is not bound by the survey proceedings, and that that part of the decision of the Zillah Court which declares that the plaintiff is entitled to the land claimed should be reversed. In other respects the decision of the Lower Court is affirmed. Although the plaintiff has, in my opinion, shown that he is entitled to some lands to the north of the boundary laid down, he has failed to prove, to my satisfaction, that he is entitled to the lands up to the boundary line which he claims. That being the case, I can only declare that he is not bound by the line laid down, and not that he is entitled up to the boundary which he has claimed.

It appears to me that the appeal must be allowed; that the decisions of the Lower Court and of the Division Bench of this Court must be reversed, so far as they declare that plaintiff is entitled to the lands specified in the plaint; and that we must merely declare that the boundary line laid down in the survey map as the boundary line of his permanently settled estate is not the true boundary line, and that the plaintiff is not bound by the survey map or by the order of the Collector of the 15th April, 1859, and the subsequent proceedings thereon. The Government has failed substantially in the suit. They ought to pay the costs of this appeal to the High Court, and the appeal from the first Division Bench to this Court.

The result is that the Government will pay all the costs in the Lower Court and in this Court.

Jackson, J.—I concur with the Chief Justice on all the points.

Phear, J.—I substantially agree with the Chief Justice on all the points. But I confess that I have, during the course of the case, felt very much

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difficulty as to what was the exact cause of action which we have been trying, and I am still not without hesitation as to the propriety of the form of decision which the Chief Justice and my brother Jackson think is correct.

If the plaint itself alone be looked at, it is, I think, almost impossible to say that anything actionable on the part of the defendant, that is, the Government, is there disclosed. The written statements that I have seen afford no aid whatever with regard to this point, and it is only now, at the last moment, that I have been able to discover there were issues settled between the parties. But from the course the litigation has taken in the different Courts, and from the arguments of the Counsel before us, I came to the conclusion, which I believe to be substantially correct, that plaintiffs' intended ground of complaint is this, *viz.*, that the Government, who settled Pergunnah Shooshung with his ancestors, have wrongfully drawn a boundary line cutting off a portion of the estate so settled, and have forbidden the plaintiff the enjoyment of zemindary rights in the portion beyond and on the hill side of that line. If this be so, I think that that constitutes a cause of action upon which the plaintiff can ask for a declaration of right under Section 15, Act VIII of 1859, because it constitutes a cause of action upon which he could have come to a Civil Court for relief independently of that Section.

But it seems to me that a declaration of right to be made under Section 15, in the contemplation of the Legislature, must be such a specific right as the Court would be obliged to arrive at, and find to exist in the case, before it would be justified in giving other relief than a mere declaration of right itself.

I think therefore that, if we come to the conclusion in this case that the Government has committed a wrongful act, we ought to specify distinctly the proprietary right which we consider that the plaintiff has established beyond the line wrongfully drawn by the Government, and has shewn to be violated or threatened by the drawing of that line. This is the right which I suppose he asks us to declare, because I do not think, that he could, under the Act, ask for the declaration of any other right than that which is attacked by the defendant's wrong-doing. The specification of such a right necessarily involves a specification of the locality or area over which it extends. Indeed, it seems to me that a proprietary right is not fully defined until at least the property to which it relates is indicated. To say that a claimant has the right to possession of some land beyond a given line, without giving any clue to the specification of that land, appears to me to be as vague and indefinite as if the declaration had simply been that he was entitled to some sort of proprietary right, and had gone no further towards distinguishing it.

It seems to me, too, that we shall be doing much to encourage great additional and mischievous litigation if we hold that Section 15 does in effect create a cause of action. For if this Section justifies the indefinite declaration of right, which is now proposed to be made, it justifies the plaintiff in coming into Court with just so much materials, and no more, as will be enough to lead to such a declaration, and to my mind this will be a cause of action which Courts have not hitherto recognised as sufficient. Thus, for instance, it will be always competent to a plaintiff who is desirous of bringing a possessory action to confine himself, in the first instance, to bringing a suit to obtain a general declaration that his possessory rights extend beyond, or exist within, a specified boundary, before he makes up his mind to bring a suit to obtain possession of any definite area of which that boundary may be a part definition.

For my own part, I am prepared, on the facts of this case, to go beyond the decision of my colleagues. I am prepared to declare that the plaintiff has proprietary rights in certain specified villages beyond the disputed line. That the Government line is wrong, and that the drawing of it has been a wrongful act on the part of the Government, I have no sort of doubt. Indeed, I think that the Chief Justice has clearly pointed out that the act was most arbitrary and high handed.

The evidence, with which the Chief Justice has so fully dealt, is, to my mind, absolutely conclusive against the line being the northern boundary of the Pergunnah which was settled with the plaintiff's ancestors. No doubt, if a proprietary right is to be proved by user alone, it must be always remembered that any particular acts of user are only evidence of just so large a right as will justify the act of user. If an easement will suffice for that purpose, the right of easement is all that the evidence proves. But when acts of user of different kinds are established, such that they can only be justified by attributing them to several easements, then it becomes matter of consideration, on the facts of the case, whether they are not rather referable to the one paramount right of ownership than to several minor rights of easement; and the best guide to a conclusion on this point is that which, I believe, the Chief Justice has before laid down in this Court, and which is certainly to be found in many of the decisions of the Courts at Westminster, *viz.*, this, to see whether or not acts of user exhibit all the modes of enjoyment which under the circumstances of the case it would be reasonable to expect would be displayed in regard to the property.

To English lawyers a familiar example is that of the seashore between high and low water. If a person shows that he has always been accustomed to take sand from it, that alone may be justified by presumption of a grant to take sand; and so with seaweed, mooring dues, or any other single act of enjoyment. But if he shows that he has been accustomed to do all these things, or a large number of them, it would be proper for the Jury to infer that he did so by reason of a right of ownership, rather than because he had originally obtained so many separate grants.

So here, if the acts of enjoyment which Mr. Justice Seton-Karr appears to think illustrated all the modes of enjoyment of which this disputed property could reasonably be expected to be capable, then I think that the learned Judge would have been right had he drawn the conclusion of facts that those acts of user were attributable to proprietorship of the tract upon which they were exercised; and in that case his confirmation of the judgment of the Lower Court would have been unimpeachable, had he also gone on to specify that he found that these acts were done, and the enjoyment had, throughout the whole of the area, been claimed by the plaintiff. As, however, he did not draw that inference of fact, but came only to the conclusion of Mr. Justice Macpherson, that nothing more than the particular rights which Mr. Justice Macpherson found had been made out by the plaintiff, I cannot understand, I confess, how the Senior Judge of the Division Bench could escape from the necessity of passing the judgment which Mr. Justice Macpherson recommended.

For my own part, I am not indisposed to say that, as a Juryman, I should have drawn the inference of fact from the evidence of user alone, which Mr. Justice Seton-Karr seems to have avoided; but I think, had there been any doubt left upon this point, so far as concerns the evidence of user, that is entirely removed by the documentary evidence in the case, showing the acts and acknowledgments of the Government Officials, and the fact that Garrow mehals in the hills were recognized as belonging to Pergunnah Shoosung, as well as the other Pergunnahs mainly lying at the foot of the hills, from the earliest period to which our evidence goes back.

It is perfectly unnecessary for me to support what I have just said by a detailed reference to the evidence itself, as that has been so effectively done by the Chief Justice.

I am of opinion that we ought to declare that the so-called boundary line drawn by the Government, confirmed by the various decisions of the Commissioner and Board of Revenue, which are sought to be set aside, is not the boundary of plaintiff's settled estate, Pergunnah Shoosung; and I think, further, that we ought to declare that the villages mentioned in the roobocarees of Mr. Irwin, Mr. Scott, and Mr. Inglis, and in the decision of Mr. Jenkins, form part of the settled Pergunnah Shoosung.

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CASE 1809 OF 1867.

Special Appeal from Backergunge.

Puree Jan Khatoon and others, (Plaintiffs) *Appellants, versus* Bycunt Chunder Chuckerbutty and others, (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Baboos Ashootosh Dhur, Hemchunder Bannerjee, and *Kallee Mohun Doss* for Appellants.

Baboos Unnodapurshad Bannerjee and *Onoocool Chunder Mookerjee* for Respondents.

The giving a declaratory decree is entirely in the discretion of the Court.

Where a case is remanded for trial on a specific issue, the Lower Court cannot re-open questions assumed by the Court above as determined. (E. Jackson, J, dissenting.)

This case was remanded on the 29th January, 1867, by Justices Trevor and Glover.

It appears there were originally two special appeals, numbered 2185 of 1866 and 2245 of 1866. The appellants in No. 2185 are now before us as special appellants in No. 1809. They were plaintiffs in the Zillah Court.

The plaintiffs in special appeal No. 2245 sued certain ryots under Section 10, Act VI of 1862, Bengal Council, for measurement of the lands in their occupation. The defendants in that suit pleaded that the lands did not belong to the plaintiffs, but to another party, the plaintiffs in No. 2185, special appellants in the case under consideration.

The Lower Courts on enquiry found that the plaintiff in No. 2245 had never been in possession of the lands, and therefore dismissed his suit. The special appeal No. 2245 proceeded on the ground that it was not necessary, in order to give him a right to measure, that he should be in actual possession, inasmuch as the right to possession was quite sufficient to entitle him to obtain what he asked for.

The learned Judges above referred to held that Section 10, Act VI of 1862, contemplated possession by the receipt of rent for those lands of which the measurement was required, and as plaintiff had not proved such possession, the Lower Court was quite right in dismissing his suit. Special appeal No. 2245 was therefore dismissed with costs.

With reference to special appeal No. 2185, which, we may observe, was heard and disposed of at the same time, and by the same decision as No. 2245, the learned Judges observed "that the plaintiffs sued, as in possession, for a declaration by the Court, under Section 15, Act VIII of 1859, of their right to certain lands, these rights having been placed in jeopardy by the act of the survey authorities, who measured and demarcated those lands as being within the defendants' estate. The Judge, accepting the plaintiff's statement as to possession, finds that, as more than six years have elapsed since the act complained of forming his cause of action arose, plaintiffs were out of Court under the Statute of Limitations."

The learned Judges proceed to observe "that the Statute of Limitations would not apply to a claim for a declaration of title, the *plaintiffs being in possession* of the land regarding which the declaration is required; that it is competent to the Court, however, to enquire whether the act complained of is so recent and of such a nature as to entitle plaintiff to a declaratory decree; for the Court will not be put in motion, under Section 15, Act VIII of 1859, unless some injury appear so probable as to lead to the conclusion that unless stayed by the declaratory decree, the inchoate or threatened injury may be completely perpetrated. If the Court is satisfied on this point, it will pass a declaratory decree, otherwise it will refuse the same."

With these clear and precise instructions, the case was remanded, with directions to pass orders in conformity with the same.

The Judge, on the remand, observes that the order of remand does not preclude him from entertaining and deciding the question of the plaintiff's possession, inasmuch as in his former decision he had only admitted the plaintiff's possession by way of argument. On the question of possession, the Judge was of opinion that there were very serious objections to the reception

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of the evidence as true which had been adduced by the plaintiff in support of his possession, inasmuch as in a former suit in 1856, to which the plaintiffs were parties, those documents had not been produced, though it was of the utmost importance to the plaintiffs to file all evidence that would bear on their case, and naturally it was to be expected that the documentary evidence on which the plaintiffs now rely should have been brought forward in 1856, and that therefore the only conclusion the Judge could come to was that the evidence was not then in existence, and is consequently spurious, and fabricated for the purposes of the present suit. Lastly, the Judge observes that even two of the plaintiff's own witnesses, namely, Ramcumul Sein and Sudderooddeen, who are also in the plaintiff's employ, support the defendant's claim. On the whole, the Judge thinks that the evidence upon which the plaintiffs relied could not be trusted, and that therefore, as they have not proved either their title or possession, their suit must be dismissed.

In special appeal it is contended—

First.—That as this suit was remanded by this Court for the sole purpose of enquiring into the point whether the act complained of was so recent and of such a nature as to entitle plaintiff, special appellant, to a declaratory decree, the Judge was not competent to re-open the question of possession, but should have confined himself to the issue upon which the suit was remanded.

Second.—That, even if the Judge were competent to re-open the question of possession, his decision is erroneous and defective, *first*, because the Judge is in error in supposing that in the suit under Act VI of 1862, Bengal Council, the question of possession was not determined in favor of the special appellant, and against the special respondent; *second*, because the Judge has improperly rejected the documentary evidence of the special appellant, on the ground that this evidence was not filed in the suit of 1856; for, according to the contention in that suit, it was wholly unnecessary to file these documents then. Moreover, only one of the plaintiffs in the present suit was a party to the suit of 1856.

Another ground is taken, to the effect that the Judge has misunderstood the evidence of the two witnesses, Ramcumul Sein and Sudderooddeen.

A cross-appeal is preferred by the special respondent, to the effect that the suit of the plaintiff for a declaratory decree would not, under the circumstances set forth in the plaint, lie, and that it ought to have been dismissed.

The cross-appeal of the special respondent was argued first. The pleader for the special respondent contends that the plaint discloses no cause of action, and that the plaintiff, special appellant, is not entitled to a declaratory decree under the provisions of Section 15, Act VIII of 1859. A decision of the second Bench, Justices Bayley and Phear, in No. 1164 of 1867, dated 25th February, 1868, which has not been published,* and a decision published in Wyman's Reporter, III, page 60, were quoted in support of the argument.

Section 15, Act VIII of 1859, runs thus:—"No suit shall be open to objection, on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Court to make binding declarations of right without granting consequential relief."

In the case No. 1164, cited by the pleader for the special appellant, Mr. Justice Bayley held that "no overt act of hostility, or attempt to take possession from the plaintiff in that suit," had been alleged in the plaint. It was merely suggested that the plaintiff might be injured by a certain demarcation made by the survey authorities; and that as the plaintiff had preferred no objection at the time of the demarcation to the survey authorities, although he had full notice of their proceedings, he was not entitled to relief under the provisions of Section 15, Act VIII of 1859.

Mr. Justice Phear added "that a plaintiff who seeks relief under Section 15 must make out, to the satisfaction of the Court, some act done by the defendants which is hostile to and invades his rights, and which would

* It *has* been published. Wyman's Reporter, V. 171. ED.

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justify an injunction or a decree for damages, or a decree for delivery of possession, or some other decretal order being passed against the defendants if the Court had so thought fit to exercise its discretion."

In the decision published in Wyman's Reporter, Vol. III, p. 60, the plaint was for a declaration, under Section 15, Act VIII of 1859, that the demarcation line set down in the survey map was wrong. The plaintiff in that suit had not appeared before the survey authorities, and pointed out that the boundary line was erroneous.

The Court (the Chief Justice and Mr. Justice Loch) held that it is discretionary in the Courts whether they will give a declaratory decree or not. Taking the circumstances of the case then before them into consideration, those learned Judges held that the case was not one in which justice required that such a decree should be made.

It is clear from these decisions that it is entirely in the discretion of the Court to grant relief under the Section, or to withhold it, and each case must be judged by its own particular circumstances. Is then the present case one in which the Court, exercising a wise discretion under the Section, ought to give relief? I am of opinion that it is.

The plaintiffs sue, not only on the allegation that the defendant has caused a demarcation to be made behind their backs, which takes a slice from their estate, and annexes it to that of the defendant, but that the defendant, under color of this proceeding, has sued the plaintiffs' tenants for rent under Act X, and has proceeded against them to enforce a measurement under the provisions of Act VI of 1862, Bengal Council. These are acts which, in my opinion, are hostile and obviously injurious to the plaintiffs' title, and I would hold that the suit, under Section 15, will lie. The cross-appeal ought, in my opinion, to be dismissed with costs and interest.

On the grounds taken by the special appellants, I think that the decision of the Judge ought to be reversed.

The order of remand distinctly proceeded on the assumption that the special appellants were in possession. Had there been any argument as to the question of possession before the remanding Judges, their judgment would have taken notice of such argument. The judgment observes that the Judge "accepted the special appellant's statements as to possession," but thought the claim barred under the Statute of Limitations. The learned Judges proceed to observe that the statute does not apply to a claim for a declaration of title, "the plaintiffs being in possession of the land regarding which the declaration is required." Words cannot be clearer.

The Judge, without touching the point for which alone the suit was remanded, re-opened the whole question of possession In doing this, I think he was clearly wrong, and that he acted in opposition to the orders of this Court.

I am further of opinion that, even admitting for argument's sake that the Judge was competent to re-open the question of possession, he was clearly wrong in rejecting the evidence as to possession adduced by the special appellants, simply because it had not been filed in a previous suit in 1856.

In the first place, all the special appellants before us were not parties to that suit. Only one of them was a party. He sued on the footing that he had purchased a 2-anna share of the property in dispute in that suit; that his vendor, withholding the rent, caused a sale of a 4-anna share of the property which included the plaintiff's 2 annas, and the suit was to recover a 2-anna portion of the sale proceeds in deposit.

The defendant's plea, while admitting execution of the bill of sale, was that the sale of the 2 annas to the plaintiff in the suit of 1856 was a conditional one, subject to his taking certain proceedings to adjust a decree; that failing to carry out those conditions, the sale fell through; and that therefore the plaintiff in that suit had no title to any of the sale proceeds.

In such a suit it does not appear to me that it was at all essential to prove plaintiff's possession. All he had to prove was that the 2 annas really passed to him by an unconditional sale. It may be that his vendor had not put him

in possession of any title-deeds, and that therefore, in 1856, the plaintiff was unable to produce them. But, be that as it may, he was not bound to produce them in that suit as the proceedings stood. And they ought not to have been summarily pronounced, to be manufactured for the purposes of the present suit, simply because they were not filed in 1856. Moreover, the position of the plaintiffs, special appellants, is very much changed since 1856. They are now the maliks by purchase and otherwise of the whole 16 annas of the property which was the subject of litigation in 1856. The two witnesses for the plaintiffs do not support the defendant's case. They make a mistake in the name of the talook, which is so far favorable to the defendants' claim, but their evidence, taken as a whole, is clearly hostile to the defendants; and reading the whole evidence, as also from the context, it is clear that the name of the talook was a pure mistake

In this view I would reverse the decision of the Judge, and decree both this appeal and the plaintiffs', special appellants' suit, with costs of all the Courts, bearing interest.

The e being a difference of opinion between us, the opinion of the senior Judge will prevail.

Jackson, J.—I am also of opinion that a sufficient cause of action has been put forward by the plaintiffs, special appellants, and that the Judge was therefore right to entertain this suit, and proceed to try it.

There are some rulings of this Court that a mere demarcation in a Government survey map does not afford a sufficient cause of action to a person who alleges that a portion of his land has been demarcated in the map of another estate. But in this case the defendant took other steps to enforce his right to the land so demarcated, and such acts were hostile and injurious to the rights of the plaintiffs, and afford him a sufficient cause of action.

I cannot, however, concur with my learned colleague that the Judge was in error, on the remand to him, in trying the issue of possession. It was an issue which, on the statements, clearly arose between the parties. The plaintiff had asked for a declaration of his title, and a confirmation of his possession. The defendant had denied the plaintiff's title, as well as his possession. There was then a distinct issue on the question of possession. The Judge, in the first instance, had dismissed the plaintiff's claim, on the ground that the suit had not been brought within six years of the date on which the hostile survey demarcation, which he sought to set aside, was made. This Court, on special appeal, held that the Law of Limitation did not apply to such suits, and remanded the case for trial on the merits, if the plaintiffs had made out a sufficient cause of action. The Judge therefore was, I think, right to try the remaining issues which, on the statements of the parties, required decision, and foremost among them was the question of possession. But it is said that that question had been already decided in another suit between the same parties in which the defendant had come into Court as plaintiff, asking for a measurement of the lands of the ryots living on the disputed land. The Judge took notice of this objection, and decided that in that case he had not determined that the present plaintiff was in possession. We have heard that decision read, and I am of opinion that the Judge was right in the view which he took of it, and that consequently he was right to go on and determine in this case whether the plaintiff was, as he alleged, in possession or not. In trying this question, the Judge rejected a number of zemindary papers put in by the plaintiff, on the ground that these were not produced in the course of a former suit in which the question of the plaintiff's possession had been raised. It appears to me, on reading the decision in that suit, that the point of possession was considered in it, and that it was important to plaintiff to have proved his possession if he had then possession. The plaintiff in that suit alleged that he had purchased and obtained possession of a certain share in an estate, and, as such purchaser, that he was entitled to certain moneys then deposited in the Collectorate. The defendant in that suit alleged that the plaintiff's

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purchase was not complete; that there had been a conditional sale to the plaintiff; and that, under certain circumstances, that sale would have become a complete sale, but the plaintiff had not conformed to the terms laid down between the parties, and the purchase had therefore not been completed, and the plaintiff had not obtained possession; and it followed that the plaintiff was not entitled to the money he claimed. In such a suit the plaintiff might have proved that the sale was complete, without adducing evidence to possession, and indeed the plaintiff might have recovered the money if the sale were complete, although he had not obtained possession. One ground upon which the decision went against the plaintiff was that he had not proved his possession. Of course possession would have been very strong evidence that the sale had been complete, and the absence of evidence upon the point was very properly remarked upon by the Judge who decided it. But it is a question whether the Judge in this suit is right in totally rejecting the whole of the documentary evidence now offered to possession, because it was not then produced. The decision in that case was that the sale to plaintiff was, as the defendant then alleged, not a complete sale; but there is no longer any question upon this point. It is not now denied that the plaintiff's purchase is a complete purchase. It may, as the plaintiff's pleader suggests, have been since completed; and the zemindary papers now put in may have been made over subsequent to the decision of that suit. It may even be that the zemindary papers were even then in his possession, but he neglected to file them. The Judge is not, in my opinion, justified in rejecting the whole of these papers on no other grounds but that, if genuine, they would have been filed in the former suit. There may have been numerous reasons for their absence in the former suit. The plaintiff, or his zemindary agents, might have been examined on the point They might have explained the omission to file them, or it is possible that they could not have explained it; but the Judge was not right to reject the papers when the examination of the witnesses had not been turned on this point. The Judge is also clearly wrong in the view which he has taken of the evidence of two of the witnesses who do not depose to the defendant's possession, but in whose evidence there seems to have been a clerical mistake which has led the Judge into error.

However reluctant I may be to remand a case a second time to the Judge, still, if the Judge has drawn a conclusion from a former decision which is not justified by that decision, and has, upon that conclusion, wrongly rejected the whole of the plaintiff's documentary evidence as manufactured for the purposes of the present suit, I think that there is no other course to adopt. My learned colleague is of opinion that the Judge should not have tried the question of possession at all. Therein I have the misfortune to differ from him. I think he should have tried it, but that there has been error in law in the mode in which he has tried it. I would remand the case for retrial.

CASE 182 OF 1867.

26th March.

Regular Appeal from Dinagepore.

Lutchmeeput Singh Doogur and another, (Defendants) *Appellants, versus* Mookta Keshee Debee, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Mr. R. T. Allan and *Baboos Onoocool Chunder Mookerjee* and *Sreenath Dass* for Appellants.

Baboo Ashootosh Chatterjee for Respondent.

A sale made in execution of a decree passed by a Court of another district will be void, unless all the provisions of the law in regard to the conduct of such

The plaintiff, as trustee of the estate of Sreenath Sandial, a lunatic, sued to set aside two summary orders of the Judge of Dinagepore, dated respectively the 19th June and 28th December, 1866, and to obtain possession of a 5 annas 6 gundas 2 cowrees 2 krants share in certain properties specified in the schedule annexed to the plaint, which she alleges she purchased at an auction in satisfaction of a decree obtained by the lunatic against one Juddoonath Sandial. The sale, it is alleged, took place on the 4th September,

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sale be observed and carried out.

and was confirmed on the 4th December, 1865. The suit is valued at Rupees 56,366-4-12.

The defendants stated that the sale at which the plaintiff purchased was invalid, and vitiated by a defect in the procedure prior to sale; that the properties in dispute had been purchased by them on the 8th January, 1866, in satisfaction of a decree against the same judgment-debtor, *viz*, Juddoonath Sandyal; that they had received a certificate under Section 259 of Act VIII of 1859, and been put in possession.

The Principal Sudder Ameen held that "the purchase of the defendants had become null and void, as the plaintiff, whose purchase is prior in date, had virtually become the owner of the property, and the judgment-debtor had lost all right and title in it."

With reference to the irregularity in the procedure prior to the sale at which the plaintiff purchased, the Principal Sudder Ameen held that the defendants were not entitled to raise any objections on that score, as they were not injured by such irregularities.

The suit of the plaintiff was decreed, the summary orders set aside, and possession awarded to the plaintiff in her capacity of trustee to the estate of the lunatic. The defendants to pay all costs.

The defendants appeal.

The plaintiff, respondent before us, purchased the properties in dispute in satisfaction of her own decree, or rather the decree obtained by the lunatic, her husband, for whom she is trustee. This decree was obtained in the Court of the Principal Sudder Ameen of Burdwan. It became necessary to execute this decree against the estate of the judgment-debtor, situated within the jurisdiction of the Dinagepore district. The procedure to be followed in such cases is laid down in Section 285 of Act VIII of 1859, and the Sections which immediately follow that Section.

It appears that the Principal Sudder Ameen of Burdwan, on the application of the plaintiff, decree-holder, addressed the Judge of Dinagepore, directing him to issue an order, under Section 235 of Act VIII of 1859, prohibiting the judgment-debtor from alienating his properties situated in the Dinagepore district. No application was made under the provisions of Section 285, and no certificate was forwarded to the Court by which the decree-holder, the plaintiff, wished the decree to be executed. The Judge of Dinagepore issued the prohibitory order under Section 235, and intimated to the Principal Sudder Ameen of Burdwan that he had done so. Subsequently, and without further procedure under Section 285 and the Sections following it, and without further attachment, the properties in dispute were put up for sale, and purchased by the plaintiff A certificate, however, under the provisions of Section 259, was not granted to the plaintiff, and therefore there has been no valid transfer of the right, title, and interest of the defendant in the property sold. (*Vide* the latter portion of Section 259.) Possession also was not given to the plaintiff. Subsequently the defendants, who had obtained a decree in the Moorshedabad Court against the same judgment-debtor, *viz.*, Juddoonath Sandial, applied in the manner laid down by the Code under Section 285, obtained the attachment and sale of the properties in dispute, became the purchasers thereof, and, on obtaining the certificate of their title, were duly put in possession.

The question before us is this. Which sale is to prevail?

We are of opinion that the sale under which the plaintiff purchased is invalid, and that the purchase by the defendants must prevail.

The provisions of Section 285 were not carried out. The plaintiff, who had obtained a decree in the Burdwan Court, which could not be executed within the jurisdiction of that Court, whose duty it was to execute the same, made no application to that Court in the manner laid down in Section 285. No copy of the decree or certificate that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Burdwan Court, was forwarded to the Dinagepore Court, within whose jurisdiction the properties against which the plaintiff desired execution are situated.

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The Dinagepore Court, instead of proceeding according to the rules laid down for execution of decrees referred by another Court, proceeded to sell without further attachment, and without conforming to the procedure laid down in Section 285 and the following Sections. Such a sale is clearly illegal. This view is supported by a decision published in Wyman's Reporter, Vol. IV, 170, in a case which is on all fours with the present case. The plaintiff is not in the position of a stranger who purchases without any responsibility for the regularity of the proceedings prior to the sale, and as such is entitled to consideration, for she is the representative of the decree-holder, and it was incumbent upon her to observe all the formalities required by the law. It is a somewhat curious coincidence that in a case in which this plaintiff was the decree-holder, published at Volume VII, Weekly Reporter, page 267, she was distinctly informed by this Court how an attachment of property, situated in another district than that in which the decree is passed, must be made. The Principal Sudder Ameen seems to consider that the defendants have not been injured by the irregularities, and therefore they are not entitled to object. The Section apparently relied upon by the Principal Sudder Ameen, although he does not quote it, is Section 256. That Section refers to objections by judgment-debtors who must prove to the satisfaction of the Court that they have sustained substantial injury by reason of such irregularity before a sale can be set aside. The defendants are third parties who have purchased at a sale regularly conducted, and after all the formalities prescribed by the law had been observed by them. Section 256 does not apply to their case. It is idle to say that they would not be injured if their purchase is set aside, as such purchase represents a portion of the money due to them under their decree, and which the judgment-debtor may have no other means of satisfying. The plaintiff is also unable to produce her title-deed, the certificate of sale, under which alone the right, title, and interest in the property purchased passes.

We reverse the decision of the Principal Sudder Ameen, and decree this appeal, the result being that the plaintiff's suit is dismissed with costs of both Courts, bearing interest.

CASE 627 OF 1867.

26th March.

Miscellaneous Appeal from Backergunge.

Ramdhun Roy and others, (Judgment-debtors) *Appellants, versus* Khajah Abdool Gunee and others, (Decree-holders) *Respondents.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboos Romesh Chunder Mitter and *Sreenath Dass* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

An application to execute a decree must contain particulars of the suit in which it was given, the parties, the nature of the decree, property sought to be attached, &c., if it is to be regarded as a *bonâ fide* application, such as would extend the period of limitation in execution.

We are of opinion that this case clearly falls within the principle adopted in the recent Full Bench Ruling of this Court, which is not, we believe, yet reported, and that the execution of this decree having been absolutely barred on the 6th April, 1865, no subsequent proceedings, whether permitted by inadvertence of the Court, or by the silence of the judgment-debtor, can revive that which had been absolutely extinct. The last effective proceeding, taken before the application in April, 1865, was the sale which took place at the instance of the creditor in January, 1862, (it was the sale of property belonging to other judgment-debtors), and which was confirmed in March, 1862. Intermediately between those proceedings, 1862 and April 1865, a petition, on the part of the decree-holder, was lodged in the Judge's Court on the 30th December, 1864. That petition set forth that the decree-holder had allowed the execution proceedings to be struck off the file, but that it was now requisite for him to take some measures to realize the amount due to him, and he therefore prayed that his case "might be restored to the file." It seems that, upon the recommendation of a mohurrir of the Judge's office, the case

was "restored to the file," and an order was made that notice should be served on the debtor. But the decree-holder took no further step whatever, either in pursuance of that order, or otherwise, and the petition in question was therefore, with the proceedings, again struck off the file. Now, if that petition had been an application within the meaning of the Procedure Code, for execution of a decree, the question might have arisen whether it was a *bonâ fide* application, and as such, a proceeding to keep the decree in force which would prevent the bar of limitation from taking place.

But it seems to us quite clear that this petition could not be so designated. Section 207 of the Code of Civil Procedure provides that "when any person in whose favor a decree has been given, is desirous of enforcing the same, he shall apply to the Court, whose duty it is to execute the decree, either in person or through his pleader in the suit, or some other pleader duly appointed to act for him on that behalf; and then Section 212 provides "that the application for execution of a decree shall be in writing, and shall contain, in a tabular form, the following particulars, *viz.*, the number of the suit, the names of the parties, the date of the decree, whether any appeal has been preferred from the decree, and whether and what adjustment of the matter in dispute has been made between the parties subsequently to the decree, the amount of the debt or damage due upon it, or other relief granted by the decree, the amount of costs, if any were awarded, the name of the person against whom the enforcement of the decree is sought, and the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or otherwise, as the case may be."

Now this last portion of the Section is a very material one, because the requisition made upon the Court for its assistance by way of delivery of property or arrest of person named, or attachment of property, would be an excellent indication of the real intention of the decree-holder to enforce his decree; and although the Court might not be inclined to look rigidly at the application, to see whether it contained the whole of the particulars set forth in that Section, it would undoubtedly require to be shown that the application did contain some essential particulars, and, above all, that it required the assistance of the Court to carry out and enforce the decree by means there specified. But the petition to which reference is made in this case contained not one single particular of those set forth in the Section cited.

It merely states:—"My execution case has been struck off. I ask the Court to replace it." This was filed apparently with some vague intention of subsequently moving the Court to make a further order. But whatever the intention of the party may have been, he carried it no further, and no application to execute the decree was made at that time. It seems therefore to us quite clear that no proceeding had taken place within three years next before April in 1865, in respect to which question could arise whether or not that proceeding was *bonâ fide*.

We think therefore the execution was, and is, barred, and the decree-holder cannot proceed. The appeal must be allowed, and the decision of the Court below reversed with costs.

Miscellaneous Appeal from the 24-Pergunnahs.

CASE 504 OF 1867.

27*th March.*

Hameeda Bibee and others, *Appellants, versus* Noor Bibee, *Respondent.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboo Anund Gopal Palit for Appellants.
Baboo Poorno Chunder Shome for Respondent.

A Zillah Court can either by way of review, or of its inherent authority,

This is a petition by Hameeda Bibee and others, complaining of the grant of a certificate by the Zillah Judge of the 24-Pergunnahs to Noor Bibee in respect of the estate of Faizoollah, deceased. It appears that Noor Bibee,

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cancel its order for grant of certificate of administration, if satisfied that it was obtained by fraud and misrepresentation.

describing herself as a resident of the 24-Pergunnahs, and as the widow of this Faizoollah, applied to the Judge of that district for a certificate under Act XXVII of 1860, and the Judge, I presume after taking the various steps prescribed by that Act, granted Noor Bibee the certificate in August, 1867. Very shortly after the granting of the certificate, the present petition came before the Judge, and represented to him that the said certificate had been obtained from his Court by fraud, inasmuch as neither was the deceased Faizoollah, a person whose ordinary place of abode was within the 24-Pergunnahs, nor was Noor Bibee, as she alleged herself to be, the wife of Faizoollah, and upon this allegation they prayed the Zillah Judge to enquire into the matter, and to recall the certificate granted to Noor Bibee. The Judge in his decision, dated the 6th September last, held that it was not competent to him to entertain the applications, inasmuch as the Act, *viz.*, Act XXVII of 1860, does not authorize the Zillah Court to cancel a certificate once given. The Judge observed that the applicant must either institute a suit to set aside the certificate, or he must obtain from the High Court an order which would authorize his Court to re-open the matter; and he accordingly rejected the application. It is not quite clear what order the Judge meant that the petitioner should obtain from the Court which would authorize him, the Zillah Judge, to re open the matter. I do not find in Section 6 (which states under what circumstances the Sudder Court may interfere with orders made by the District Court) any provision which precisely meets the present case. The petition now before us is not brought forward by way of appeal against the Zillah Judge's order, so much as by way of application with a view to this Court granting a fresh certificate, or otherwise interfering in the matter. We know at present nothing of the merits of this case; the matter has not gone beyond a mere allegation on the part of the petitioner. It is manifest, however, that if that allegation be true, and if the deceased Faizoollah had a fixed place of residence within the town of Calcutta, and not within the 24-Pergunnahs, that the Zillah Court of the 24-Pergunnahs would have no jurisdiction to grant a certificate in respect of his estate; but neither would this Court itself possess any such jurisdiction. It seems to me, however, that the Zillah Judge has taken too contracted a view of his own powers in respect of the application made to him. It seems to me a power inherent in all Courts of Justice, on finding that an order has been obtained from the Court by fraud and misrepresentation, and that the true facts are such that, if they had been known to the Court, the Court would not have acted in the matter, for the Court, on being satisfied of such fraud, to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged.

It is true that Act XXVII of 1860 makes no provision for the withdrawal of a certificate granted by the Civil Judge; but if it were necessary to bring this matter within the written provisions for procedure of Courts in this country, it seems probable that the Zillah Judge, on the complaint of a person aggrieved by his order in granting this certificate, might review the order which he had made, and thereupon might recall the certificate. But whether the Zillah Judge might have acted under the rules relating to review, or under the general power that I have spoken of, I entertain no doubt that he might so deal with his first order, and ought to do it on being satisfied of the fraud which had been practised.

I think therefore the Zillah Judge, on receiving the petition of Hameeda Bibee and others, ought to have immediately called upon the petitioners to substantiate their allegations by affidavit or other proof; he should thereupon have summoned the holder of the certificate, and, after due enquiry into the circumstances, have passed such orders as the case might seem to demand.

I do not know that, under the circumstances stated, we can make an order which shall be binding upon the Zillah Judge, requiring him to act as I have stated. But I am quite satisfied that, after the expression of our opinion to this effect, the zillah Judge will not hesitate to do that which, in our opinion, he ought to do, and to consider the circumstances. If, contrary to

our expectations, the Judge should again refuse to act, the petitioner, if so advised, may make a further application to this Court.

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CASE 1318 OF 1867.

30th March.

Special Appeal from Backergunge.

Golam Ali Chowdhry and others, (Plaintiffs) *Appellants, versus* Baboo Gopal Lall Tagore and others, (Defendants) *Respondents.*

Before *Phear* and *E. Jackson*, J. J.

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.
Mr. R. T. Allan and *Baboo Kally Mohun Dass* for Respondents.

Where a chur forms in a navigable river in front of several estates, and the channel between it and these estates becomes fordable opposite some one or more of them, the owners of those the most contiguous estates become entitled to the whole chur. The subsequent drying of the channel between it and the other estates gives the owners of these latter no claim.

It is admitted that the chur, a share of which the plaintiffs seek to obtain by bringing this suit, first made its appearance as an island surrounded by unfordable water in a large navigable river, and was at that time, by law, at the disposal of Government. Afterwards the channel between it and the shore of the river became fordable at a certain part. The Government did not assert its right previously to the occurrence of this event, and consequently thereto it declined to do so. Under these circumstances, as soon as the channel became fordable, according to Regulation XI of 1825, Section 4, Clause 3, the chur became an accession to the land of the person or persons whose estate or estates on the bank of the river fell under the description of being "most contiguous" to it. We think this somewhat vague phrase is intended to comprise only the estate or estates with which the chur comes into contact, so to speak, along the length of the fordable part of the channel. It does not embrace estates which may be on the river bank opposite some portion of the chur, but with an unfordable channel lying immediately between them and the chur. The Regulation is silent as to how the chur is to be partitioned between the estates, in the event of its being an accession to more than one at once; but no difficulty on this account arises here, because the Lower Appellate Court has found as a fact that when the annexation to the river bank took place, the fordability of the channel did not extend beyond the defendant's frontage. Consequently, with the interpretation just given to the Regulation, the whole chur then became an accession to the defendant's land, and part of his tenure. If this be so, no portion of it would afterwards cease to belong to him, merely by reason of the deep water between it and, say, the plaintiff's estate becoming shallow and fordable. The sitting up of the channel could not have the effect of transferring the ownership from the one person to the other. Again, after the chur had, by the first occurrence of the fordable channel, become part of the defendant's property, all further accretions to it, if gained by "gradual accession," would also belong to him, even though the result would, in the aggregate, be a prolongation of the chur in front of estates on the river bank not belonging to the defendant. The Lower Appellate Court appears to us to have determined the case in conformity with these principles, and the special appellant has failed to satisfy us that there is any ground for impeaching the decision in this Court. We therefore dismiss this appeal with costs.

CASE 341 OF 1867.

31st March.

Regular Appeal from Rungpore.

Tarramohun Bhuttacharjee, (Plaintiff) *Appellant, versus* Kripa Moyee Dabea, (Defendant) *Respondent.*

Before *Loch* and *Hobhouse*, J J.

Baboo Nilmonee Sein for Appellant.
Baboos Sreenath Dass and *Romesh Chunder Mitter* for Respondent.

An adopted son succeeds, not only lineally, but collater-

The suit was brought to have plaintiff declared the reversioner to the property left by Radhanath Bhuttacharjee, by setting aside the adoption of

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ally, to the property of his relations in the adoptive family.

When an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father, he takes an equal share. If there be sons subsequently begotten of the adoptive father, the adopted son takes a less than equal share.

one Woomanath made by the defendant Kripa Moyee, his widow, without permission, and to declare plaintiff to be the sole heir of Ramanath Chuckerbutty, his widow Chundramonee Dabea having deceased.

The lower Court held that the adoption was valid, the defendant Kripa Moyee having full permission to adopt, and that all the objections to the mode of adoption, and to the character of the natural father of the child adopted by Kripa Moyee, were refuted by the evidence. The Principal Sudder Ameen therefore dismissed this part of the plaintiff's claim. With regard to his claim to be considered sole heir to the deceased Romanath Chuckerbutty, the Principal Sudder Ameen found that the plaintiff and the adopted son were both in the same degree of relationship to the deceased, and as such both were entitled to share; but as Woomanath was an adopted son, the Principal Sudder Ameen, referring to a case reported in II Macnaghten's Hindoo Law, page 69, held that plaintiff was entitled to two-thirds, and Woomanath only to one-third of the property.

An appeal has been preferred by the plaintiff against the whole decision, but, on the case coming up for hearing, the appellant's pleader gave up so much of the claim as asked the Court to declare him to be the reversioner to the property of Radhanath Bhuttacharjee, but prayed the Court to try his right to the whole estate of Romanath Chuckerbutty, by setting aside the adoption of Woomanath; and he urges that even if the adoption of Woomanath be found valid, plaintiff is, nevertheless, entitled to the whole estate.

A cross-appeal is taken by the respondent under Section 348, to the effect that the adopted son is entitled to take a moiety of the estate of the deceased Romanath Chuckerbutty, and not a third, as supposed by the Principal Sudder Ameen.

The pleader for the appellant, after ascertaining the opinion of the Court in regard to the terms of the deed of permission, dated 18th Aghran, 1259, which he read out, withdrew his objection as to the fact of the adoption, and of the defendant's right to adopt.

He then urged that, as laid down in the Dyabhaga, an adopted son, though entitled to succeed as heir to the property of his adoptive father, cannot succeed to the property of his adoptive father's relatives; he can succeed lineally, but not collaterally; and in support of his allegation the pleader read a passage from Devala, quoted in Section 7, Chapter X of the Dyabhaga, and the author's comment in Section 8, to the effect that the true legitimate son and the rest to the number of six are not only heirs of their father, but also heirs of kinsmen, that is, of sapindas and other relations; the others are successors of their (adoptive) father, but not heirs of collateral relations (sapindas); and then as to the share of the adopted son, the pleader quoted Section 9 from the same book:—"They take the whole estate of a father who has no legitimate issue by himself begotten, but if there be a true son, such of them as are of the same tribe as the father take a third part."

With regard to the question of the right of an adopted son to succeed collaterally, as well as lineally, we think it sufficient to quote the Privy Council Decision in the case of Shumboo Chunder Chowdhry, dated 6th February, 1835, reported at page 25, Sutherland's Privy Council Judgments, which ruled that, according to the authorities on Hindoo Law, and the weight due to them, an adopted son succeeds, not only lineally, but collaterally, to the inheritance of his relations.

We have now to determine whether Woomanath, being an adopted son, would take only a third, or is entitled to share equally with plaintiff in the property left by Romanath Chuckerbutty. There is no contention that if, after a son be adopted, a son be born of the body, the latter is entitled to the larger portion of the inheritance, whether two-thirds or three-fourths, and the former only to the remainder. There can also, we believe, be no doubt that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, when there is no such son subsequently born. The decisions of the late Sudder Court quoted in the margin, and the following passage from the

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I Volume, Select Reports, page 206.
VI Volume, Select Reports, page 203.
Sudder Decisions for 1858, page 1863.

Vyavashta Durpana, page 887 of 2nd Edition, verse 584, supported by authorities, prove that such is the case:—" An absolute dattaka properly adopted ceasing to belong to the Gotra of his natural father, becomes a member of the family of his adopter, and represents his legitimately begotten son, and the duties and the rights of the legitimately begotten (ourasa) son devolve upon him " A case is quoted to us from II Macnaghten, page 69, f. f. Looking at the answer given, we have some doubt whether there was not some confusion in the pundit's mind as to the position of the adopted son in that case; but whether this be so or not, that case is not applicable to the present. It appears to us that the position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father; that when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share which his father would have obtained. In the present case plaintiff and defendant are in equal relationship to Romanath Chuckerbutty; their respective grandfathers were his first cousins, and their respective fathers were his first cousins once removed; so that if the property had been inherited either by their grandfathers or by their fathers, the shares of each would have been equal; and such being the case, there is no reason why the plaintiff and defendant should not each take the share to which their respective fathers were entitled. A passage from the Duttaka Chundrika, Section V, paragraph 25, has been quoted to us to prove that the adopted son of a brother does not receive the same share as his uncle, but all that the passage appears to rule is that the adopted son of one adopted succeeds only to his adoptive father's estate. In the present case we find that the adoptive father would have been entitled to a moiety of the property left by Romanath Chuckerbutty, and his son is, we think, entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body, does not, in our opinion, hold good in the case, for the claimants do not derive their title from the same father. We dismiss the plaintiff's appeal with costs, and correct the Principal Sudder Ameen's judgment in regard to the defendant, and assign to Woomanath a moiety of the property left by Romanath Chuckerbutty. The defendant, cross-appellant, will obtain her costs.

Special Appeal from Patna.

CASE 2415 OF 1867.

3rd April.

Ramyad Shahoo (Plaintiff) *Appellant, versus* Doolar Shahoo, (Defendant) *Respondent.*

Before *Macpherson* and *E. Jackson*, J. J.

Baboo Kishen Succa Mookerjee for Appellant.
Baboo Tarrucknath Sein for Respondent.

When an arbitration award is not contested, it need not be brought into Court for execution, and the fact of its not having been so brought into Court will not prevent effect being given to it by the Courts in subsequent suits.

This was a suit to recover certain lands. The plaintiff put forward, as his title-deeds to those lands, a bill of sale in the name of Bijnath Shahoo, and an arbitration award made between plaintiff and Doolar Shahoo. Plaintiff alleged that the lands had been purchased jointly by himself and Doolar Shahoo in the name of Bijnath Shahoo, the minor son of Doolar Shahoo, and that in a separation of estate between himself and Doolar Shahoo, which had been carried out by arbitrators, these lands had fallen to his share. Doolar Shahoo did not contest the claim, but Byjnath Shahoo, being of age, alleged that the purchase by his father had been made for his, Bijnath Shahoo's benefit, and with money belonging to him, Bijnath Shahoo.

The first Court decreed the plaintiff's claim. The Appellate Court, however, was of opinion that the arbitration award was rendered null and void by the plaintiff not having brought it into Court to be enforced within six months of its being passed, and quoted Section 327, Act VIII of 1859, in support of

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this view of the law. On this ground the Appellate Court dismissed the plaintiff's suit.

On special appeal it is urged that the Appellate Court has taken an erroneous view of the law. We think that it is erroneous. Section 327 enacts that if an arbitration award is brought into Court within six months, it may, if no objection is raised to it, be enforced as a decree, and execution taken out upon it. But it does not follow that all arbitration awards, not so brought in, are invalid. As Doolar Shahoo has not contested the plaintiff's claim under the award, that award is good as between the plaintiff and Doolar Shahoo. As between the plaintiff and Bijnath Shahoo, the issue was properly raised in the first Court, whether the lands were purchased by Doolar Shahoo for himself and the plaintiff jointly with their funds, or whether they were purchased by Doolar Shahoo for Bijnath Shahoo with Bijnath Shahoo's funds. The Principal Sudder Ameen must proceed to try the same issue. This decision is reversed, and the case remanded to him.

CASE 2432 OF 1867.

8th April.

Special Appeal from Patna.

Beharee Ram, (Defendant) *Appellant, versus* Mussamut Shoovuddra, (Plaintiff) *Respondent.*

Before *Macpherson* and *Glover*, J. J.

Baboo Doorgadass Dutt for Appellant.
Baboo Grish Chunder Ghose for Respondent.

To support a claim of pre-emption on ground of vicinage, plaintiff must be *owner* of the neighbouring property to that claimed, not merely in possession of it.

Glover, J.—This was a suit to cancel a deed of sale of the 29th April, 1866, and to recover possession from the defendant of a thatched house and courtyard or compound, on the ground of right of pre-emption as a "neighbour."

The defence was that the plaintiff had no land contiguous to the plot claimed by her, and was therefore not a "neighbour." The defendant, who was in possession by purchase from the owner, one Seeta Ram, further alleged that the disputed house and courtyard abutted on to his property, and that he, and not the plaintiff, had the right of pre-emption,—a right which he had duly exercised.

The Moonsiff, not being satisfied with the evidence of vicinage, held a local investigation, and found that the house and land, on account of which the plaintiff claimed the "huk-shuffa" in the disputed plot, did not belong to her, but to her nephew, the minor son of Mottee; and that as she did not sue on behalf of the son, she had no ground of action, her own property not being contiguous to that claimed, but at some distance from it. He found, moreover, that she had not performed the necessary ceremonies ("tulub-i-monsibat.")

The Principal Sudder Ameen reversed this decision, on the ground that the defendant's statement as to the ownership of the contiguous land had been proved to be false, and also because, in his opinion, a Civil Court decision, (No. 206) to which both plaintiff and defendant were parties, showed that the plaintiff was then in possession of the contiguous land, and had therefore the right of pre emption over the land now in suit. He found also that the necessary ceremonies had been performed.

It appears to me that this decision is wrong on the face of it. The plaintiff claiming as "shuffee," by reason of neighbourhood, was bound to prove her case, and to show that the contiguous land belonged to her. So far as her claim went, it was absolutely immaterial that the defendant pleaded that the land was part of a Government road, for any amount of mis-statement in this particular would not help to prove what the plaintiff was bound to prove, namely, that she owned the contiguous land, and the Principal Sudder Ameen was clearly wrong in allowing this to influence his decision.

Then as to the Civil Court decision. There is nothing on the record to show that the land is identical, but it is said that, during the trial of the present suit, the defendant's pleader admitted that the land then in question was the same as that on the ownership of which the plaintiff now claims as "shuffee;"

but even if this be admitted, it does not advance the plaintiff's case in the least. That was a suit for permission to demolish a wall, and the plaintiff in this case was allowed so to demolish it. The Principal Sudder Ameen takes this as proof of the plaintiff's possession, and holds that being in possession of the contiguous land, she is entitled to the right of pre-emption which she seeks.

But mere possession gives no "huk-shuffa," according to Mahomedan law. There must be ownership ("milik") in the contiguous land (*vide* Bayley's Mahomedan Law, page 473), and it has been found as a fact that this land does not belong to the plaintiff, but was originally the property of Mottee, her brother, and that Mottee has left a minor son now under his aunt's care.

These facts are nowhere denied, and therefore, although the plaintiff may be in possession of the contiguous land, it is clear that she is not the owner of it, the title being with her nephew. The plaintiff does not sue as guardian of the minor, but in her own right, and therefore, as it seems to me, has, on the admitted facts of the case, no *locus standi* whatever.

The Principal Sudder Ameen has considered that possession and ownership of contiguous land give similar rights of "shuffa;" but this is a clear error of law. There is no doubt that the contiguous land belonged to Mottee, and that his son is the proper person to claim the right of pre-emption. The plaintiff has no case.

I would reverse the decision of the Principal Sudder Ameen, and restore that of the first Court with all costs on the special respondent.

Macpherson, J.—I concur.

Miscellaneous Appeal from Purneah.

CASE 8 OF 1868.

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Syud Fedeh Hossein, (Objector) *Appellant*, *versus* Mussamut, Khajoorun-nissa, (Opposite Party) *Respondent*.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Messrs R. V. Doyne and *C. Gregory* for Appellant.
The Advocate General and *Moonshee Ameer Ally* for Respondent.

A certificate of administration must not specify the property to which the estate to be administered to is composed. Any party injured by such specification may appeal to High Court, and will, if successful, get his costs.

We have had no doubt as to the order which we ought to make in respect of the certificate granted in this case. In point of fact, the learned Counsel on both sides agreed from the first that the certificate could not be sustained. The only question upon which any doubt existed in our minds is as to costs.

The petitioner, Rance Khajoorun-nissa, applied to the Judge, reciting that her husband Rajah Enaet Hossein had recently died, leaving a minor son, named Syud Ata Hossein, to whom he had, by a will made some time before his death, bequeathed the whole of his landed and other property. She then alleged that, under this will, she, as guardian of the minor, was in possession of the whole of this property, specifying the Pergunnah Soorjapore and the appurtenances thereof. She then represented to the Court that, for the efficient management of the zemindary, and for the purpose of conducting suits on behalf of this minor son as the representative and successor of the deceased Rajah, it was necessary for her to take out a certificate, and she therefore prayed the Court to grant her a certificate under the provisions of Act XL of 1858.

Now it is quite true that she does not, in the petition, expressly ask the Court to grant her a certificate to manage the Purgunnah Soorjapore; but it seems to me quite clear that the language of her petition was so worded as to solicit, and to lead the Court to grant her a certificate of that tenor, and that, precisely in accordance with that petition, the Judge did, in fact, grant her a certificate in which the Pergunnah was specified, and the minor was described as the proprietor of the same estate.

We have no doubt that the appellant before us was entitled to appear in the Zillah Court and to object to the grant of a certificate of the nature

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which the petitioner obviously desired, and that when the Court granted such a certificate, its terms being manifestly of a kind likely to be prejudicial to him, that he was further justified in coming in appeal to this Court.

The certificate, it appears to us, must be cut down, so as to be in precise conformity with the terms of Act XL of 1858, Section 3; that is to say, it must be a certificate enabling the petitioner, Ranee Khajoorun Nissa, to administer the property of her minor son, Syud Ata Hossein. As the Ranee is the mother and natural guardian of this minor, it becomes necessary to appoint her to be guardian under the terms of the will, and the certificate must contain no specification whatever of the extent or nature of the property to which the minor is entitled. Under the circumstances we have above stated, it appears to us that the appellant, having succeeded in obtaining this material amendment of the certificate, is entitled to his costs, both in this Court and in the Court below.

We think also it should be added that this portion of the Judge's decision, which speaks of the appellant under the name of Meer Bubroo as an impostor put forward by Syud Ahmed Roza, should be declared to be extra-judicial, and to have no effect upon the rights or claims of the appellant.

The Judge, we observe, has not pronounced in favor of the will, or against it, but the expressions we have just read are such as might undoubtedly be prejudicial to the appellant in future litigation.

The same order will apply to the appeal No. 27 in which Mr. Gregory appears on behalf of a distinct objector.

CASE 734 OF 1867.

9th April.

Miscellaneous Appeal from Hooghly.

Bidhoo Bibee, (Decree-holder) *Appellant, versus* Lalla Keshub Chunder Baboo and others, (Judgment-debtors) *Respondents.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboos Mohendro Loll Mitter and *Obhoy Churn Bose* for Appellant.
Baboo Bama Churn Banerjee for Respondent.

A payment by a judgment-debtor to an Officer of the Court arresting him under a warrant is such an adjustment of the decree as the Court must recognize.

In this case the appeal must be dismissed with costs. The appellant had a decree against Lalla Keshub Loll. In execution of that decree, process of arrest was issued, and the warrant is before us. It distinctly directs the Officer of the Court to arrest and proceed against the debtor according to law, unless he forthwith pays him the amount of the debt, 160 Rupees 13 annas and 5 pie, together with costs of execution.

The Judge has found, upon the evidence, as matter of fact, that, in execution of this warrant, the Officer of the Court did take the defendant, and that the defendant thereupon paid him the money, which money was paid over to the execution-creditor.

It is contended that this is not a payment which ought to be recognized by the Court, inasmuch as it is an adjustment of a decree which has not been made through the Court, or certified to the Court by the person in whose favor the decree is made

It seems to us, however, quite clear that this latter Clause of Section 206 does not relate to payments made under pressure of the process of the Court, but relates to voluntary adjustments of a decree made between the parties to a suit. If parties paying money to the Officer of the Court under authority of the Court's process, and under pressure of that process, are not to be protected, it appears to us that no judgment debtor would be safe. The Judge having found, as a fact, that this appellant has received his money, we think he is not in a position to ask for "remedies," or object to the payment as not being made through the Court.

Regular Appeal from the 24-Pergunnahs.

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CASE 307 OF 1864.

Brojokishoree Dassee, guardian of Radhanath Bose, her adopted son (one of the Defendants), *Appellant, versus* Sreenath Bose, for himself and as guardian of his minor sons, Juddoonath Bose and others, (Plaintiff) and others, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *Hobhouse*, J.

Mr. Montriou and *Baboos Ashootosh Dhur* and *Mohendro Loll Shome* for Appellant.

Mr. R. V. Doyne and *Baboos Chunder Madhub Ghose* and *Nilmoney Sein* for Respondents.

A declaratory decree will not be given at the instance of a stranger, even though he sue with the consent of the true reversionary heirs.

Analysis of the position of the parties to this case.

This suit was brought by Sreenath Bose, son of Boiddonath Bose, on his own behalf, and as guardian of his minor sons, against Brojokishoree Dassee, the widow of Muthooranath Bose, as guardian of her alleged minor son Radhanath Bose, also against the widow of Gobind Purshad Bose and the widow of Rajkristo Bose.

The plaint sets out that the deceased Muthooranath Bose was a cousin of the plaintiff, being the son of his father's elder brother, Ramdhun; that Muthooranath's widow, Brojokishoree, after the death of Muthooranath, namely, in the year 1260, adopted a son, although her husband had left her no permission to do so; that, under color of that adoption, she had applied for a certificate under Act XX of 1841 to the estate of Golucknath, her husband's brother; that the Judge trying the case summarily had granted the certificate, and that that judgment had been upheld on appeal to the late Sudder Court. The suit was brought to set aside the said certificate, to declare the adoption invalid, and to declare that in the absence, meaning upon the death of the female defendants, the plaintiff and her sons successively would be the heirs of the husbands of the female defendants and of Golucknath Bose, deceased.

The suit commenced on the 31st December, 1861, and the judgment of the late Sudder Court, affirming the grant of the certificate, was given in December, 1858, nearly three years before the commencement of this suit.

The plaintiff was son of Boiddonath, one of the four sons of Nund Coomar Bose. Ramdhun was the eldest of those four sons. Gobind Purshad, whose widow is one of the defendants, was the second son and a brother of Ramdhun. Boiddonath, the father of the plaintiff, was the third son, and Rajkishoree, whose widow is also a defendant, was the fourth son. Ramdhun, the eldest of the four brothers, had two sons, Golucknath and Muthooranath, and a daughter, Phoolkishoree. Golucknath died, without issue, on the 12th of April, 1842, leaving a widow, Unnopoorna Dassee, who died on the 1st March, 1857. Muthooranath, the alleged adoption by whose widow is the matter in dispute, died in 1833. The daughter, Phoolkishoree, had two sons, Soorjocoomar Roy and Jadub Coomar Roy. Radhanath is alleged to have been adopted in 1853.

It is clear that, under the circumstances above stated, Soorjocoomar Roy and Jadubcoomar Roy were the heirs of Golucknath, and the presumptive reversionary heirs of Muthooranath if the adoption of Radanath was invalid, they being the sons of a sister, and the plaintiff being merely a cousin.

If the adoption of Radhanath was valid, he was not the reversionary heir of Gobind Purshad, nor of Rajkishen, inasmuch as he was one degree further removed than the plaintiff, the plaintiff being a nephew, and Radhanath being the son of a nephew.

In default of brothers, brother's sons succeed. They take according to numbers, and not by representation, as grandsons and brother's sons are totally excluded by the existence of brothers.

As regards, therefore, the widow of Gobind Purshad and the widow of Rajkishen, there was no necessity to make them parties to this suit, inasmuch as Sreenath would not have to get rid of the adoption of Radanath, who, if validly

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adopted, was merely a nephew's son, in order to establish his own reversionary heirship as nephew. Therefore, as far as the estate of Gobind Purshad and Rajkishen are concerned, there is no necessity for a declaratory decree as regards the validity or invalidity of the adoption.

I understand that the plaintiff has withdrawn, or that he gave up now that part of his prayer which asks for a declaration that, upon the death of the female defendants, he and his sons successively will be the heirs of the husbands of the female defendants. But even if he did not give it up, he would not be entitled to have any such declaration, inasmuch as he would not be the heir of their husbands unless he should survive them; and it was a matter of contingency whether he would survive them or not.

The question therefore is reduced simply to whether the adoption is invalid, and whether the plaintiff is the heir of Golucknath.

He cannot be entitled to a declaration that he is the heir of Golucknath, inasmuch as he is not such heir, even if the adoption be invalid. Whatever may be the effect of the consent of Soorjocoomar Roy and Jadubcoomar Roy, it cannot have the effect of making the plaintiff the heir of Golucknath.

The only question which remains to be decided is whether the Court should declare the said adoption invalid. To this extent the suit does not ask for relief, but merely asks for a declaratory order.

It has been decided in several cases, in England, that, under the 15 and 16 Vic., Chapter 86, which contains words similar to those of the 15th Section of Act VIII of 1859, it is in the discretion of the Courts in what cases a declaratory decree ought to be made. By "discretion" we do not mean "caprice," but a discretion to be exercised according to sound principles. The cases were particularly referred to by me in the case No. 424 of 1866, IV Wyman's Reporter, page 60, Civil Rulings.

One of the principles upon which the Courts are guided is that a declaration will not be made at the instance of a stranger, who has no right to come to and interfere with the affairs of other men. That was decided in Hossein *vs.* Dino Bundhoo Sein by Mr. Justice Phear in Bourke's Reports, page 8; and it appears to us to be a sound principle. For instance, in a case of this sort, a stranger, who has no interest in the matter, has no right to commence a suit and to ask a Court for a declaratory decree that the adoption of a particular individual is invalid. It might be very reasonable, at the instance of a presumptive reversionary heir, whose estate would not accrue until the death of the widow, to try whether an adoption made by a widow was valid or not, and upon proof of the invalidity of the adoption, to declare that it was invalid. In such a case, if the reversionary heirs should be compelled to wait until the death of the widow before they could get the question tried as to the validity of the adoption, they might have to wait until after all the witnesses who could prove the invalidity of it were dead, for the widow might outlive the witnesses. Such a suit might, we apprehend, be maintained by the presumptive reversionary heirs for the benefit of the persons, whether themselves or others, who might be the heirs of the husband at the time of the widow's death, in the same manner as the presumptive reversionary heirs may sue to restrain a widow from committing waste, although, if the widow should survive them, they would sustain no injury by the waste. It is unneccesary for the Court now to determine whether, if, in such a case, the defendant should succeed in establishing the validity of the adoption, the decree would not be binding upon the persons who might eventually succeed upon the death of the widow, in the same manner as a decree against the widow respecting the rights of her husband in an estate is binding upon the reversionary heirs. It has been decided by the Privy Council that such a case is binding upon the reversionary heirs in Ranee Surnomoyee's case reported in II Weekly Reporter. This of course is upon the assumption that the suit is honestly brought and conducted.

A decree establishing the adoption in a suit brought by a stranger would not be binding upon the reversionary heirs; it would be binding only upon the stranger and persons claiming through him, or persons such as Soorjo-

coomar Roy and Jadubcoomar Roy, who, in the present case, had given their consent to his carrying on the suit.

It is very necessary that the Court should be careful in making declaratory decrees as to rights. They ought not, as a general rule, to be made in cases which are wholly one-sided, and in which the decree would not be binding upon the parties really interested, if the defendant should succeeded in establishing his right.

Now, in this case, Sreenath, the plaintiff, as regards the estates of Golucknath and Muthoornath, irrespective of the deed of compromise, which was the subject of the third voice case, was a mere stranger when he commenced the suit. It has been shown that he was not the heir either of Golucknath or of Muthoornath; and if the case had remained in the same state as that in which it had been when the suit was commenced, I, for my part, should have had no difficulty in deciding that he was not entitled to a declaratory decree with reference to the validity or invalidity of that adoption.

But an ikrarnamah was filed three years after the suit had commenced, dated the 26th January, 1864, in which Soorjocoomar Roy and Jadubcoomar Roy, who were the presumptive reversionary heirs, declared that the suit had their full consent, and that plaintiff might carry on the said suit at his own expense. But we are at a loss to understand how the fact of their being made defendants, as they have been, or giving their consent that the plaintiff should carry on this suit, can entitle the plaintiff to a declaratory decree. It is not because a man who has a right consents to a man who has no right bringing a suit that the man who has no right can maintain it, nor can the making the man who has the right a defendant alter the case. It is still the stranger, with the consent of the reversionary heir, asking for a decree that the adoption was invalid, making the real heir a defendant, to enable him to show, if he can, why the stranger should not have a declaratory decree to that effect.

It appears to us that, even with the consent of the presumptive reversionary heirs, the plaintiff, a stranger, had no right to have a declaratory decree with reference to the validity or invalidity of the adoption.

But a deed of compromise of 1839 was put in evidence, in which the plaintiff, as manager of certain estates which were conveyed to him by that deed of compromise, had an interest in showing that Radhanath had not been legally adopted, and although the plaintiff had not set up that deed of compromise in this plant as one of the grounds on which he sought to have it declared that the adoption was invalid, an issue was raised in the suit whether the plaintiff had a right to question the adoption.

The Judge held that it was clear, on the arguments, that the plaintiff was the next heir, if the adoption of Radhanath should be disallowed; and he proceeded to try the issues, *first*, whether Brojo Rajkishoree had the right to adopt; and, *secondly*, whether Radhanath was legally adopted. The Judge found that Brojo Rajkishoree had no right to adopt, and gave a declaratory decree that the adoption was invalid, and Radhanath was not, under such adoption, the legal son and heir of Muthoornath. The Judge having found the first issue in favor of the plaintiff, it was unnecessary for him to express an opinion on the second issue.

When the case came before this Court on appeal from the decision of the Judge, there was a difference of opinion between the two Judges before whom the case was first heard as to whether the plaintiff had a right to question Radhanath's adoption. It was not whether the plaintiff, as heir of Golucknath, or as heir of Muthoornath, had that right. The case was referred for a third voice, and was heard by me; and it appeared to me that the plaintiff had an interest under the deed of compromise of 1839 to question the adoption. The decision is reported in VIII Weekly Reporter, page 241.

If it had been determined in a suit between the plaintiff and Radhanaths' guardian that the plaintiff had no right to question the adoption, the plaintiff might probably have been bound by that decision if Radhanath had instituted a suit against him with reference to the deed of compromise; and it appeared to

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me that the plaintiff had the right to question the adoption with reference to that deed.

As a single Judge, I had no power to determine any other question than that as to which the difference of opinion prevailed. I had no power to try whether the adoption was valid or not, nor whether, under the circumstances of the case, the plaintiff was entitled to a declaratory decree.

The case has now come back to be tried upon the merits whether the adoption was valid or not, and whether the plaintiff is entitled to have a declaratory decree.

It appears to us that the plaintiff would not be entitled to a declaratory decree, even if he should prove that the adoption was invalid. He has based his right in the suit, as regards Muthoornath's estate, upon the ground that, upon the death of his widow, he would be the heir; and it appears to us that he has failed to show that he was the reversionary heir, and the consent of the real reversionary heirs does not entitle him, as a stranger, to have a declaratory decree, even if he could prove that the adoption was invalid.

The ikrarnamah would, according to English law, amount to champerty, for the real heirs consent to the plaintiff's carrying on the suit at his own expense, with an agreement as to the mode in which the property should be divided amongst them, should he succeed.

We do not mean to say that the law of champerty is a law applicable to the Mofussil; but we think that the Court would be exercising a very unsound discretion, and acting upon a very erroneous principle, if it should allow a stranger to interfere in family affairs, and to have the adoption declared invalid under an agreement between him and the real heirs; that if he could establish the invalidity of the adoption, he should be entitled to a share of the estate.

With regard to his claim to set aside the certificate which was affirmed by the Sudder Court in 1858, the same reasons apply. As a stranger, he has no right to set aside that certificate, and it is therefore unnecessary for us to determine the question which was raised, that as to that part of the suit he was barred by limitation.

The certificates, however, and the suit regarding it, are material features in this case. Radhanath was adopted in 1853, upwards of eight years before the commencement of this suit. His mother, as his guardian in the summary suit for that certificate, which was resisted both by Soorajkooer Roy and Jadubkooer Roy, and by the plaintiff in this suit, established, to the satisfaction of the Judge, and of the late Sudder Court, on appeal, that the adoption was valid. For three years before the commencement of this suit that certificate had been in force. Neither Radhanath nor his mother had attempted, or claimed in any way to interfere with the rights of the plaintiff under the deed of compromise. They were merely acting under the validity of that adoption with regard to Muthooranath's estate, and with regard to that portion of the estate of Golucknath which had not been included in the deed of compromise, and the certificate was not applied for until after the death of Golucknath's widow.

It is clear that the certificate to Golucknath's estate could not entitle either Radhanath or his mother to interfere with any portion of the property of Golucknath, which Golucknath in his lifetime had conveyed away by the deed of compromise. That deed applied only to ancestral property which had descended from Nundcoomar Bose, and not to any property acquired subsequently by Golucknath.

The plaintiff asks in this regular suit to have it declared that Radhanath's adoption is invalid. It appears to us that the *onus* rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person who asks a Court to declare that a thing is invalid is bound to prove that it is so. The Act which enabled the Court to make a declaratory decree does not enable the Court to call upon a man to prove his title, at the instance of one who asks to have a declaratory decree that he is not entitled. But this case seems to have been treated both by the issued raised and the mode in which the evidence was dealt with, as if the defendant

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had been called upon to prove that his adoption was valid, and not that the *onus* lay upon the plaintiff to prove that it was invalid.

The plaintiff has not proved the invalidity of the adoption. He has not proved that Brijo Rajkissoree had no right to adopt, or that Radhanath has not been legally adopted. Radhanath was living in the family, and treated as the adopted son. He had had a decree in his favor three years before this suit commenced, in a suit to which the plaintiff was a party, declaring that adoption to be valid, and that decree had been confirmed by the late Sudder Court three years before this suit commenced. The mother of Radanath appeared as a witness, and deposed that her husband had given her verbal authority to adopt. She and Golucknath, through whom the plaintiff at the time he commenced this suit claimed as heir, and through whom Soorajcoomar Roy and Jadubcoomar Roy, who consented to this suit, claim as reversionary heirs in the Bill which they filed to set aside the will of 1239, prayed that the widow of Muthooranath should adopt under the direction of the Court. That shows that Golucknath did believe that, independently of the will of 1239, the widow had that power. In their answer to the suit filed against them by Hurrymohun, they swore that a paper purporting to be a will of Muthooranath, and of which they annexed a translation, was wholly in the handwriting of Muthooranath. That would be evidence against Golucknath, and those claiming through him as his heirs, that such a document really did exist.

Whether it was actually executed, or so far completed as to become a will, it is not material now to consider, because, whether it was a will or not, it was a paper declared by Golucknath to be in the handwriting of Muthooranath, in which he declared that he had authorized his wife to adopt a son.

It is said, both as regards this paper and the alleged will of 1239, that there was a Clause in it stating that three copies had been deposited in certain places, and that those copies were not forthcoming. That remark might have been material if the question had been whether Muthooranath had so far completed the paper as to constitute it his will. The fact of his not having made the deposit of the copies as stated, might possibly have been used as an argument to show that he had not completed the will, but was merely preparing it. The copies could not be deposited whilst the will was in a state of preparation, and not complete as a testamentary disposition; but it is immaterial when we look at the paper merely as a writing under Muthooranath's hand, in which he declared, not that, by that instrument, he gave his wife power to adopt, but that he had already given her such a power. The paper would be evidence of a declaration of fact, though not complete as a testamentary disposition. As against Golucknath's heirs, the non-production of any of those copies is not material, for the paper was produced by Golucknath, and sworn to by him to be in the handwriting of Muthooranath.

We are not prepared to say that a power to adopt may not be proved by the widow alone, without the corroboration of other witnesses. It is not material in this case to decide that point, for the widow is corroborated by that paper of 1237, whether it operated as a will or not; and it is unnecessary therefore to consider whether Muthooranath ever did see or sign the alleged will of 1239, or give instructions for it, or was aware of the paper alleged to be the will of 1239.

It appears to me that the plaintiff has failed to show that the widow had no authority to adopt, and that the defendants have proved that the widow had such authority.

It should be borne in mind that, as regards an adoption by a widow in Bengal, it is against her temporal interests, inasmuch as it deprives her of her inheritance.

With regard to the second issue, whether Radhanath was legally adopted, it is important to remark that the father of the boy who was given in adoption was not called in the former suit to prove that he did sell the boy, and only one of the witnesses who was called in this suit was called on the former occasion. The father of the boy broke down in that part of his evidence in

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which he attempted to show that no ceremonies had been performed. The other witness said that he believed the boy had been sold for Rupees 700, whereas the father said it was for Rupees 550. We do not think that the plaintiff has made out that Radhanath was not legally adopted; and whatever the form of the issue, it appears to us that the *onus* lay upon him to prove satisfactorily to the Court that the proper forms and ceremonies had not been gone through, before he can ask the Court to declare that an adoption which had been upheld by the Sudder Court in a suit in which the plaintiff was a party, was an invalid adoption.

Further, it appears that the plaintiff himself must have been under some impression that there was a valid adoption, because, in the suit for the certificate, he, who up to the time of the commencement of this suit in 1861, seems to have considered that he was the reversionary heir of Golucknath, set up as a ground of defence to the plaintiff's application for a certificate that he had purchased from Golucknath's widow, not that he had purchased the widow's interest (for that would be no answer to the certificate), but that he had purchased from the widow that which was a bar to the certificate, namely, the interest of the reversionary heir. If he believed that he was the reversionary heir, there was no necessity for his purchasing, unless he believed that there were grounds upon which the validity of the adoption might be set up.

We should have added that one of the plaintiff's own witnesses says that Radhanath was legally adopted.

Upon the whole, it appears to me that both the issues ought to be found for the defendant, that the widow had power to adopt, and that Radhanath was legally adopted.

Further, if it were necessary, we should hold that the plaintiff, whether the adoption was valid or not, has no right to a declaratory decree.

The decree of the Lower Court will be reversed, except so far as it orders the plaintiff to pay the costs of Juggodumba Dassee and Gobind Monee Dassee, and a decree will be given for the female defendants with costs of the defendant Brojokishoree in the Lower Court, and the costs of this appeal.

Miscellaneous Appeal from Nuddea.

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24th March.
CIVIL JURISDICTION.
RENT SUITS.

Ram Chunder Roy and another, (Plaintiffs) *Appellants*, *versus* Ramrutton and another, (Defendants) *Respondents*.

Before *Bayley* and *Phear*, J. J.

Baboos Romanath Pose and *Cally Prosono Dutt* for Appellants.
Baboo Otool Chunder Mookerjee for Respondents.

When an insolvent's property vests entirely in the assignee, it is not competent to a Court to sell a decree held by the insolvent, merely because the assignee has not claimed the decree.

A Deputy Collector ought not to sell a decree of his own Court in execution of another decree of that Court He should appoint a manager to realize the first judgment-debt. The provisions of the Civil Procedure Code in regard to non-recognition of adjustment of decrees made out of Court do not apply to rent suits.

This is an application to set aside an order of the Deputy Collector for execution of a decree against the petitioner in favor of one Parbutty Nath Buxee.

The decree was originally made in the Deputy Collector's Court in a suit wherein a Mr. J. White was plaintiff, and the petitioner defendant; but Parbuttee Nath claimed to be decree-holder by virtue of having purchased Mr. J. White's rights and interests in the decree.

On Parbutty Nath applying to the Deputy Collector for execution of the decree, the petitioner objected, *first*, that Parbutty Nath had obtained nothing by his purchase of Mr. J. White's rights and interests in the decree, because at that time Mr. White was insolvent, and all his assets (of which the decree would be one) were therefore vested in the Official Assignee; *secondly*, that he, the petitioner, had satisfied the decree out of Court before the sale thereof to Parbutty Nath.

The Deputy Collector disallowed both these objections. As to the first, he held that "the decree was never vested in the Assignee specially, for it was omitted in Mr. White's schedule. And though the assignee can claim it, he has not done so; and till he does, it remains in the legal possession of the person who now possesses it, Parbuttee Nath Buxee. The Assignee having made no claim to it, it is not in my power to assume that he has any, and protect his interest against his will."

The Deputy Collector here makes a serious mistake of law; for if, at the time of Parbuttee's purchase, all Mr. White's assets were vested in the official assignee, nothing would have passed to Parbuttee by the sale. The petitioner asked him to enquire whether this was so or not, and we think that he acted wrongly, under the circumstances of the case, in refusing to make the enquiry.

We are of opinion also that the Deputy Collector erred in selling Mr. J. White's decree against the petitioner to Parbuttee Churn. That decree was a decree of his own Court, and his duty with regard to it was primarily to cause it to be executed upon the application of any one duly entitled to have the benefit of it. It appears to have been sold in the execution of a decree obtained in the same Court by one Ramrutton against Mr. White. Instead of so selling, it seems to us that the Deputy Collector ought, under the provisions, in that behalf, of Act VIII of 1859, to have appointed a manager to realize Mr. White's judgment-debt. Had he done this, he would have acted with propriety, and would have avoided the appearance of encouraging the practice of trafficing in decrees of Court, a practice which may prevail largely, but is certainly very objectionable. The Deputy Collector refused to entertain the second objection, on the ground that he was forbidden by a rule of the Revenue Board to enquire whether or not a private adjustment had been effected out of Court. On this point also the Deputy Collector was wrong, for the rule of the Revenue Board cannot override the law; and it has been held by this Court that Section 206 of Act VIII of 1859 does not apply to decrees of a Revenue Court.

We may add that it appears to us some grave irregularity must have occurred in the execution of Ramrutton's decree against Mr. White, which has probably led to much of the blundering in this case. It is clear that at the time of the order for execution in Ramrutton's case, or, at any rate, before the sale to Purbuttee, Mr. White died. Now, on Mr. White's death, both decrees for the time being abated, although probably they might both have been revived by proper steps taken. If they were revived, the same person would

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appear as Mr. White's legal representative in both cases, and the confusion which the Deputy Collector exhibits in regard to the effect of the sale to Parbuttee Nath could scarcely have occurred.

On the whole, we are of opinion that the Deputy Collector acted illegally in refusing to entertain, and determined the petitioner's objections on their merits. We therefore quash the order which is complained of, and we direct that the Deputy Collector, before issuing fresh process of execution, enquire, *first*, whether Parbuttee Nath Buxee, by his purchase of Mr. White's right and interest in the decree made in favor of Mr. White against the petitioner, having reference to all the circumstances under which that purchase took place, obtained the right to sue out execution of that decree; and *secondly*, whether the petitioner at any time satisfied that decree by private adjustment out of Court.

The Deputy Collector will be governed by the result of this enquiry in regard to the order which he may make relative to the execution sought. Parbuttee Nath Buxee will pay the costs of the petitioner in this application.

CASE 2371 OF 1867.

27th March.

Special Appeal from Moorshedabad.

Gopee Mohun Muzoomdar, (Plaintiff) *Appellant, versus* Mr. J. B. Mackintosh, Manager on the part of the Bengal Coal Company, (Defendant) *Respondent.*

Before *Macpherson* and *Glover*, J. J.

Baboos Romesh Chunder Mitter and *Nilmonee Sein* for Appellant.
Baboo Bhowanee Churn Dutt for Respondent.

Suit to set aside lakheraj title musteen be valued at eight times the aggregate rent payable by the ryots. In the words "suit for land exempt from payment of revenue" of Clause (*d*), Schedule B, Section 11, Act X of 1862, "revenue" means "revenue" payable either to Government or a zemindar.

The question in this special appeal is whether the Lower Court is right in holding that the suit has been improperly valued, and that the stamp fee paid is less than it ought to have been. The Lower Court held that the suit was substantially one for the resumption of lands claimed to be held as lakheraj, and that as such the suit falls under Clause (*d*) of Section 11 of Schedule B of Act X of 1862, under which clause the suit should have been valued at eighteen times the aggregate annual rents payable by the ryots. In special appeal, it is contended that the suit was one which properly fell under Clause (*e*), and therefore was rightly valued.

We think that the Lower Court was right, and that the plaint did not bear a proper stamp. The suit was substantially a suit to resume lands claimed to be held as lakheraj, although this does not appear on the face of the plaint. The plaint, in fact, discloses no cause of action, and is, in itself, bad. It alleges that the defendant's being in possession of the lands in dispute by right of a jote, had not executed a kabuleut, and thereupon the plaintiff instituted a suit under Act X of 1859 for a kabuleut, and that the suit was dismissed, the Revenue Courts holding that no rent was paid for the land. The plaint concludes to the following effect:—"Hence I bring this suit to declare my right to these lands, and for possession."

There is no doubt that the suit was instituted for the one object of setting aside the lakheraj title set up by the defendants; and I have but little doubt that the plaint was framed, as it has been, merely with a view of evading the stamp law.

Then it is said, even supposing it is a suit to resume the land, and to have it declared that the lakheraj title set up by the defendants is invalid, the case still falls under Clause (*e*), and not under Clause (*d*). It is argued that the word "revenue" in Clause (*d*) must be construed as meaning "revenue to Government," and that this is apparent from the fact that "revenue to Government" is the term used in Clauses (*a*), (*b*), and (*c*), to which Clause (*d*) is to be considered as a mere sequel. But we think that (applying the ordinary rules of construction) the fact of the words "to Government" being omitted in Clause (*d*), shows that it was not intended that the word "revenue," as used in that Clause, should be limited, as it was limited in (*a*), (*b*), and (*c*),

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and that the word "revenue" in Clause (*d*) must be read as meaning revenue or rent to Government, or to a zemindar, or to any other person.

In this view we are confirmed by the language which we find was used in the corresponding Clause in the old stamp law, Regulation XI of 1829. The words used there are—"in suits for lakheraj lands, *i. e.*, lands not paying revenue to Government, the value shall be assumed at eighteen times the amount of annual rent." As the words "to Government" existed in the old Clause, and are omitted in the new, we cannot but presume that the omission was intentional.

We think that this appeal ought to be dismissed with costs.

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CRIMINAL RULINGS.

Reference to the High Court, under Section 434, Code of Criminal Procedure, from the Sessions Judge of Nuddea, in the case of Kalichurn Lahoree, convicted of giving false evidence.

Before *Kemp* and *Phear*, J. J.

Irregularities in a commitment for perjury At the preliminary enquiry in such a case, the accused must be present as accused, and must have opportunities of cross-examination and of defence.

To a prosecution by a Sub-Registrar for an offence committed before him, the specific sanction of the Registrar is required.

Phear, J.—On the 21st August, 1867, one Kalichurn Lahoree was committed by the Assistant Magistrate of Meherpoor to take his trial before the Sessions Court of Nuddea for having made a certain false statement on oath before the Sub-Registrar of Meherpoor. By a letter dated the 9th March, 1868, more than six months after the commitment, the Officiating Sessions Judge of Nuddea transmitted the case to this Court, "in order that the commitment, being in his view irregular and illegal," might be cancelled, and the whole proceeding annulled. It appears to me that the course which things have taken from the commencement to the end of this case is such as not to reflect any great credit on the two judicial officers concerned in it.

The facts in order of time seem to be as follows:—On the 5th August one Ramlall Rai and Kalichurn Lahoree appeared before Mr. Coxhead, the Sub-Registrar of Meherpoor. Ramlall Rai desired to have a certain deed registered, which purported to have been signed both by himself and Kalichurn Lahoree; and he had procured the attendance of Kalichurn by means of a Registrar's summons. Each of them then made a statement before Mr. Coxhead on solemn affirmation. The result of these statements, in the mind of Mr. Coxhead, is described by this gentleman in a letter which he immediately wrote to the Registrar of Nuddea. The letter runs thus:—

"*5th August*, 1867.

"SIR,—Under Section 20, of Act XX of 1866, I have to procure your sanction before instituting any prosecution for an offence under that Act. Two parties, the attendance of one of them had been brought about by a summons, appeared this day before me as Sub-Registrar. Both parties admitted their signatures to the deed, but one of them asserted that the contents of the deed were unknown to him; that a stamp paper, to which he, before anything was written thereon, had attached his signature, had come through some means or other, of which he was ignorant, into the hands of the other party; and that that party had filled up the deed, had fabricated a document, and had sought to bind him by a transaction which had no existence whatever. I examined both parties, and propose to put Kalichurn Lahoree on his trial, or rather hold the preliminary inquiry into such trial for making a false statement on oath before me. Of course either perjury by one party, or forgery by the other, had been committed.

"I send you the papers, with a request that you will return them on perusal, and give your sanction to the institution of the proposed prosecution. The 13th of this month is the day fixed."

To this letter Mr. H. Bell, the Registrar of Nuddea, replied on the 9th August in these words:—

"With reference to your letter No. 57, dated the 5th August, 1867, you can make over the case to the Magistrate. But which party are you going to send over?"

Mr. Bell's question is not altogether an unnatural one, although, no doubt, it was not strictly necessary for his information.

Mr. Coxhead, in his letter, had already furnished an answer to it, though he had not disclosed the actual part which Kalichurn had played in the transaction, and Mr. Bell could not gather, from the Sub-Registrar's words, what ground there was for charging the one side with perjury, rather than the other side with forgery. He might therefore well ask for something more to enable him to exercise his discretion in regard to sanctioning a specific charge being made.

It is perhaps as well to remark here that Mr. Coxhead's conclusion, that "of

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course either perjury by one party, or forgery by the other, has been committed," is not a logical conclusion from anything which he had stated in his letter. Also, it ought not to be forgotten by judicial officers that all contradictions on oath by opposing witnesses do not necessarily involve perjury, nor is the making of a document without authority always forgery. And I am bound to say, on perusal of all the depositions in this case, that I should hesitate long before I should upon them convict either Ramlall or Kalichurn of the offences specified respectively.

It is not clear what was the exact course which Mr. Coxhead pursued upon receiving the Registrar's reply to his letter. But it appears that on the 20th August he, in his capacity of Assistant Magistrate, took examinations on solemn affirmation of Kalichurn Lahoree and Ramloll Rai; that he then adjourned the investigation till the morrow, when he examined four more witnesses, also on solemn affirmation, before him as Assistant Magistrate. Having done this, he committed Kalichurn Lahoree for trial by the following instrument:—

"I, Thomas Edward Coxhead, Assistant Magistrate in charge of Meherpoor, do hereby make against Kalichurn Lahoory the charge that he did, on the 5th August, make before the Sub-Registrar of Meherpoor, T. E. Coxhead, a false statement on oath; in that, when the Sub-Registrar questioned him on a deed that had been brought for registry, he said that he knew nothing about the subject-matter of the deed, and that he had no conversation with Ramlall Rai about the subject treated of in the deed, or that there was any arrangement between them with reference to such subject-matter, and that he did not know how Ramloll Rai became possessed of the deed, or of the stamp paper containing his signature, and that he did thereby commit an offence punishable under Section 91 of Act XX of 1866, triable by the Court of Session, and I direct that he be tried by the said Court on the said charge."

This document, for the first time in the case, exhibits who was the person accused, and what was the matter of accusation. No complaint against Kalichurn Lahoree, either made by the Magistrate or any one else, preceded the investigation, for Lahoree was himself solemnly affirmed, and examined as a witness at that investigation, and there seems to have been no period at which his position was changed until the commitment was made out against him.

The charge upon which the Assistant Magistrate commits for trial is in this document expressed with a generality and vagueness which, in my judgment, is exceedingly improper. Of all criminal charges which can be made, perhaps the charge of perjury is that which the ends of justice require to be the most carefully and accurately worded. The more general the allegation of falsehood, the less is the risk in putting it forward, and the greater the difficulty of rebutting it. It is therefore the right of the person accused of perjury to have the statement which he is charged with having falsely made distinctly and separately pointed out to him, and I will venture to say that no Court can safely and satisfactorily arrive at a judicial conclusion relative to a charge of perjury unless its investigation be directed singly to each alleged false statement, with the view of ascertaining, *first*, whether it was made at all; *secondly*, whether, if made, it was true or untrue; and, *thirdly*, whether, if untrue, its untruth was present to the mind of the person making it. Now, the charge presented by Mr. Coxhead's commitment mentions at least four statements alleged to have been made by Lahoree, each one of which may or may not have been made, may or may not be true, and may or may not have been falsely uttered by Lahoree, quite independently of the others. The accused person is entitled to have a judicial determination with regard to each of them. The measure of his criminal conduct would vary with the result. Supposing, for instance, that the Court should hold it *not* proved that he committed perjury in solemnly affirming "that he knew nothing about the subject-matter of the deed, and that he had no conversation with Ramlall Rai about the subject treated of in the deed, or that there was any arrangement between them with reference to such subject-matter," but at the same time

should think it made out that he *did* commit perjury in affirming that he did not know how Ramloll Rai became possessed of the deed. In such a case it is obvious that, although the letter of the law would have been broken, still the offence committed would have been insignificant. It appears to me that the charge of perjury, for the trial of which the commitment is made, should contain a distinct assertion with regard to *each* statement intended to be characterized as perjury, that it is untrue in fact, and that the accused person knew it to be so when he made it. And it is not the less necessary that this should be so, because an alternative charge can by law be made. Indeed, the cases of alternative charges are, in my opinion, exactly those in which it is requisite that the prosecution should be most closely held down to the obligation of proving the two elements of perjury just referred to, because it is in those that the prosecution is most liable to consider that its responsibility ends with simply showing that two contradictory statements have been made by the accused person.

On the whole, then, it seems to me that Mr. Coxhead's instrument of charge and commitment is irregular in a very important respect; but I am not prepared to say that it is therefore invalid.

I think, however, that it ought to be quashed for another reason, namely, that it was not made upon such a preliminary enquiry as the law prescribes that a Magistrate should hold before he can properly commit for trial. It is clear that it is necessary to such an enquiry that the accused person (or, under certain circumstances, his agent,) should be present, that the witnesses, whose evidence is to be the foundation of the commitment, should be examined before him, and that he should have the opportunity of cross-examining them. Generally, too, there should be a complainant, who can be made responsible for the preferring of a false charge, although, in some cases, a Magistrate may take cognizance of, and probably hold an enquiry with regard to, an offence which has come to his personal knowledge, without waiting for a complaint from a third person. However, in all cases alike, there must be an accused person present, *viz*, some one against whom a definite criminal charge is made, either by the Magistrate himself, when it is legitimate for him to make one, or by another complainant. In this case there was no complaint preferred by a third person; for if Mr. Coxhead, the Sub-Registrar, can, for this purpose, be distinguished from Mr. Coxhead, the Assistant Magistrate, it was the latter, and not the former, who made the charge, as appears by the commitment also. Had the fact been that the Sub-Registrar ostensibly prosecuted, it is perhaps doubtful how far such prosecution ought to have been entertained without the Registrar's specific sanction, and certainly no such sanction was given, for Mr. Bell, when he wrote, expressed himself as not knowing whom his subordinate intended to prosecute.

But assuming that this was a case in which the Assistant Magistrate might have proceeded without a complaint (as to which I desire to express no opinion), he was at any rate bound to put Lahoree in the position of an accused person, and the preliminary enquiry contemplated by the Criminal Procedure Act could only commence from that point. Lahoree ought to have been aware, during the whole time the witnesses were being examined before him, that he was the person intended to be incriminated by their evidence, and also what was the nature of the charge sought to be established against him; he ought also to have been told that he might cross-examine the witnesses if he thought fit. It appears to me that, during the enquiry before Mr. Coxhead, Lahoree never stood in the situation of an accused person at all. His own evidence was taken on solemn affirmation in the same way as that of the other witnesses. He had no opportunity of cross-examining the other witnesses, because, according to Mr. Coxhead's own representation, no charge was made against him until the whole of their evidence was given, and the commitment written out. In truth, Mr. Coxhead, instead of making a preliminary enquiry as to the matter of any specific complaint against Lahoree, seems to have conducted a general investigation of a somewhat abnormal kind, and then to have committed

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Lahoree for trial on a charge which was the result of that investigation. I do not know what authority a Magistrate has to take evidence on oath, except in reference to some matter of complaint made against some specified person, and I am certainly of opinion that proceedings like this will not, in law, justify a commitment. No one can, I think, be properly committed for trial except after a preliminary enquiry, during the whole of which he has known the charge made against him, and has been afforded all due means of defending himself.

In my opinion, therefore, the commitment of Kalichurn Lahoree for trial at the Court of Session, made by Mr. Coxhead on the 21st August last, ought to be quashed. And here I feel bound to express my regret and surprise at the extraordinary delay which has taken place in bringing this case to the notice of the High Court.

The commitment was made on the 21st August, 1867. The case came on for trial before the Sessions Judge some time, I suppose, in September, and the prisoner's vakeel then objected to the validity of the commitment. The Sessions Judge, as he says, thought the objection valid for several reasons, and thereupon the trial was postponed for further enquiry. However, nothing seems to have been done until the re-opening of the Courts after the Dusserah vacation, when the Sessions Judge came to the opinion that the whole commitment was irregular and illegal, and that the case must be referred to the High Court to have the commitment quashed. Accordingly the case seems to have been entered in the November statements of the Nuddea Court as having been referred to the High Court for that purpose.

Notwithstanding this, neither the record, nor any letter from the Sessions Judge, did, in fact, go up to the High Court; and on the 3rd of January the Registrar of the High Court, acting on the entry in the statement, wrote to the Sessions Judge for explanation. It does not appear clearly what notice the Sessions Judge took of this letter. On the 29th February the Registrar of the High Court wrote another letter to the Judge, requesting his attention to the letter of 3rd January, and to this the latter replied on the 9th of the following month (March). In this reply the Judge admitted that the record of the case, and the necessary covering letter, had not yet been sent up by him to the High Court as it ought to have been. He took the whole blame of the omission upon himself, saying that he had been under the impression that the papers had been sent with the statement in November, and that he was quite unable to account for their not having been so sent.

I confess myself as little able to find an excuse for the Judge, as he is to suggest one for himself; and I am compelled to conclude that he has shown neglect of duty, which is culpable; for not only is his original default unexplained, but no reason is advanced why it should not have been discovered and repaired when the Registrar wrote on the 3rd of January as readily as it was two months afterwards on the 9th of March.

Kemp, J.—I concur in quashing the commitment.

CIRCULAR ORDER No. 2.

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HIGH COURT CIRCULARS AND LETTERS.

To

ALL CRIMINAL JUDICIAL AUTHORITIES.

Dated Calcutta, the 6th April, 1868.

HIGH COURT, &c.
CRIMINAL SIDE.
Before *Peacock*, C. J. and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J. J.

Limits on sentences of whipping in case of persons previously convicted.

In a recent case, certain questions as to sentences of whipping, and the maximum of punishment which can be awarded under Section 46 of the Code of Criminal Procedure, were referred to a Full Bench of this Court for determination.

The attention of all officers entrusted with the administration of criminal justice is called to two points which have been decided by the majority of the Judges composing the Full Bench Court.

It has been decided—

I.—That when a person, who has not been "previously convicted," (using the term in the sense in which it is used in Section 4, Act VI of 1864,) is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of these offences *in addition* to imprisonment or fine for the other or others; but that it is not illegal to sentence him to *one whipping in lieu of all other punishment.*

II.—That when a person, who has been "previously convicted," is convicted at one time of two or more offences, he may be punished with one, but only *one*, whipping *in addition to* any other punishment to which, under Section 46 of the Code of Criminal Procedure, he may be liable.

The Court take this opportunity of impressing upon all officers vested with power to pass sentences of whipping, that such sentences should be passed with the utmost caution, and with due deliberation; and that if any doubt is felt, either as to the legality or propriety (in any particular case) of passing a sentence of whipping, such a sentence ought not to be passed.

CIRCULAR No. 4.

HIGH COURT, &c.
CIVIL SIDE.
Before *Peacock*, C. J., and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J. J.

The Criminal side of a Judge's Court is not to close, save on days when a total cessation from business is necessary and usual.

To

ALL CIVIL AND SESSIONS JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 2nd April, 1868.

Several of the Zillah Judges appear to have entirely closed their Courts on the Criminal as well as on the Civil side for the period of the Dusserah Vacation, and to have abstained, during the whole of that period, from attending to business, receiving or opening communications from the Superior Court, despatching returns which were due, or doing any act whatever of an official kind.

Such a practice is justified by nothing in the law or in the orders of this Court; it causes great inconvenience. The Zillah Judges are therefore reminded that, under the Circular Order (Nizamut Adawlut) No. 8, dated 23rd March, 1838, issued under the orders of Government, which has never been rescinded, the Court of Session "must never be closed for the despatch of Criminal business, except on those days only when a total cessation from all business is necessary and usual;" and, moreover, that even on the Civil side of their Courts, it does not follow that because there is no sitting of the Court, therefore every official duty is to be suspended.

Extract (Para. 10) from letter No. 492, dated the 6th April, 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Tirhoot.

A Sessions Court must either convict or acquit. It has no power to discharge a prisoner.

10. I am to point out to you, with advertence to the case of Juggomohun Patuck (2 Statement 5), that an accused person tried before your Court must be either acquitted or convicted, and must apparently be called on for his defence. (*Vide* Sections 363 and 372 of the Code of Criminal Procedure.) An

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order for the *discharge* of the prisoner is one which can be made by a Magistrate under Section 225 or 250 of the Code. But no similar power, otherwise than on full acquittal, appears to have been given to the Court of Session, it being apparently assumed that the preliminary investigation has established a *primâ facie* case against the accused.

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... — Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	
Wednesday ...	Ditto ... — Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given and a list made out ...	Miscellaneous Appeals.	If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... — Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	
Friday ...	The Chief Justice .. Mr. Justice Dwarkanath Mitter ... — Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Saturday ...	The Chief Justice ... — Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Hobhouse...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. — Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	
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NOTE.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhangulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
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THE

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CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

VOLUME V.

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Special Appeal from Tirhoot.

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17th February.
CIVIL JURISDICTION.

CASE 1817 OF 1867.

Sunker Lall, (one of the Defendants), *Appellant, versus* Juddoobuns Suhaye and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Seton-Karr*, J.

Baboo Debendra Narain Bose for Appellant.
Baboo Chunder Madhub Ghose for Respondents.

In a suit to set aside a sale made by a widow without necessity, there was also a plaint for a declaratory decree that a certain bond was not given, as recited therein, for money borrowed by the widow on account of her husband's funeral ceremonies.

Held, that a suit for such a declaration could not lie by itself, and certainly not in combination with other claims as above set forth.

We do not think that in this case the plaintiff is entitled to a declaratory decree that the bond was not given, as recited in the bond, for money borrowed by the widow for the performance of the husband's shradh. It is admitted by the vakeel for the plaintiff that if the bond had not contained any such statement, a suit could not have been maintained for a declaration that the money was borrowed for the purposes of the widow, and not for any purposes binding upon the husband's estates, or upon the heirs of the husband; and it is also admitted in like manner that the recital in the bond that the money was borrowed for the husband's shradh would be no evidence of the fact in a suit against the heirs of the husband, or in a suit to charge the estate. In point of law, therefore, the recital sought to be set aside makes no difference as regards the estate of the husband, or as regards the evidence which would be necessary to prove the fact in a suit against the heirs. There is therefore no necessity for a declaratory decree

This is a case like the case to which appeal No 2542 * relates,—a claim which ought not to have been mixed up in the same suit with claims to set aside sales made by the widow without necessity. The decisions of both the Lower Courts must be reversed, and the respondents must pay the costs of this appeal, and the costs incurred by the defendant in both the Lower Courts.

*See the following case.

Special Appeal from Tirhoot.

CASE 2542 OF 1867.

17th February.

Rajbunsee Lall, (one of the Defendants) *Appellant, versus* Judoobuns Suhaye and others, (Plaintiffs) *Respondents.*

Before *Peacock*, C. J., and *Seton-Karr*, J.

Baboo Debendro Narain Bose for Appellant.
Baboo Chunder Madhub Ghose for Respondents.

A suit by reversionary heirs for a declaratory decree that certain property in possession of defendant was purchased by their ancestor through defendant benamee, will not lie.

We think that the suit as to this defendant must be dismissed. The suit was brought by the reversionary heirs to declare that the property standing in the name of this defendant had been purchased by the ancestor in his name benamee. It was a suit for a declaration of right, and not for relief.

If persons choose to purchase property in the names of others benamee, they ought at least to retain sufficient evidence in their own hands to prove that they did so; and there is no reason why the time of the Court is to be occupied for the benefit either of such purchasers or their heirs in making declaratory decrees in their favor.

We think therefore that there is no ground for the Court's making a declaratory decree; and it will be sufficient for the Court to decide what was the real transaction between the parties when the plaintiff seeks for relief.

If an application had been made to the Court in proper time to dismiss the suit as against the present defendant, there would have been ample ground for dismissing it upon the ground of multifariousness, for the plaintiffs are not contented with suing the widow and several purchasers to set aside sales made by the widow under circumstances wholly unconnected with each other, but they have thought it necessary also to add the present defendant, and to ask to have it declared, as against him, that he held other property benamee for the ancestor, and now holds it benamee for them as reversionary heirs.

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The decrees of both Courts will be reversed, with costs of this appeal and the costs in both the Lower Courts.

APPEAL 17 OF 1867.

13th March.

Under Section XV of the Letters Patent.

The Government, (Defendant) *Appellant*, *versus* Rajah Rajendrokishen Singh, (Plaintiff) *Respondent*.

Before *Peacock*, C. J., and *L. S. Jackson* and *Phear*, J. J.

Mr. Cowie and *Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Appellant.

Baboos Unnoda Purshad Banerjee, *Onoocool Chunder Mookerjee*, and *Nilmoney*, *Sein* for Respondent.

Interpretation of Regulation X of 1822. Government cannot separate any tracts in the Garrow Hills from zemindars' estates, save in the Thannahs of Gowalpara, Doobree, and Curribari. Civil Courts may correct unjust survey award. Evidence of the existence of several easements may raise presumption of ownership

Judgment on a preliminary point raised by the Advocate General, to which reference is made in the final judgment in this appeal

We think that the jurisdiction of the Civil Courts of Judicature is not taken away beyond the tract of country comprised in the 2nd Section of Regulation X of 1822.

By Regulation XLI of 1793, certain rules were laid down as to the framing of the Regulations, in order that the Courts of Justice should apply the Regulations according to their true intent and import. One of those rules was that every Regulation should have a title explaining the object of it as concisely as possible; and another, that there should be a preamble to every Regulation stating the reasons for the enactment of it.

Looking to the title and preamble of Regulation X of 1822, it is clear that the rules laid down by that Regulation were to take effect only within the limits described by that Act.

The only limits which we can find described as applicable to the places within which Regulation X of 1822 was to have effect, is the tract of country described in Section 2 of that Regulation, within which the administration of civil and criminal justice, &c., was, by Section 3, declared to be vested in an officer to be appointed by the Governor-General in Council, to be denominated the Civil Commissioner for the North-Eastern parts of Rungpore.

The proviso in Section 8 of that Regulation has been referred to; and it has been contended that, by virtue of that proviso, it is competent to the Governor-General in Council to direct the separation of any tract of country occupied by Garrow mountaineers from the estates of neighbouring zemindars in other parts of the country than those included in the tract mentioned in Section 2. But the proviso in Section 8 is merely a proviso upon the general enactment in the first part of that Section, which is expressly confined to the tract of country placed under the Commissioner, and we can hardly suppose that the Legislature intended, by a proviso upon an enactment limited to that tract of country, to give substantive powers to the Governor-General in Council in respect of other tracts of the country.

Further, it appears to us that Clause 2 of Section 8 did not intend to take away the power of any Civil Court except within that tract of country in which the civil and criminal jurisdiction had been placed in the Commissioner.

We therefore think that the Civil Court has jurisdiction in this case; that the decision of Mr. Justice Kemp and Mr. Justice Seton-Karr was correct; and that the last judgment, from which the present appeal has been preferred, is not subject to the objection taken in the first ground of appeal, *viz.*, that the Court had no jurisdiction in the subject-matter of the plaintiff's suit.

Under these circumstances, we think we must proceed to hear the appeal upon the merits.

Peacock, C. J.—This is a suit brought by Rajah Rajkishen Singh against the Collector of Mymensingh on the part of Government. The suit is for a declaration of the plaintiff's right to certain hills, villages, &c., specified in the plaint as part of Pergunnah Shooshung, by setting aside a survey award and

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proceedings, by which, I understand, is meant the boundary of the plaintiff's estate as laid down by the survey, the order of Mr. Campbell, the Officiating Collector of Mymensingh, dated the 15th of April, 1859, and the subsequent orders of the Revenue Authorities.

It appears from the order of Mr. Campbell that, on the occasion of the survey of Pergunnah Shooshung, the plaintiff laid claim to a permanently settled estate co-extensive with that pergunnah; that, owing to that claim, the Superintendent of Survey and other officers were deputed, in 1856, to lay down the boundary of the Rajah's permanently settled estate. Mr. Campbell further states that, from various causes, the expedition proved rather a failure; that some correspondence then passed between the Superintendent of Survey, the Board, and the Government, when it was determined that the clearly defined line of demarcation at the foot of the large hills should be assumed as the boundary of the pergunnah, and that the *onus probandi* should be thrown on the zemindars as to any portion of the hills to which they might lay claim to the north of that line. A line was laid down accordingly, and the case was transferred to Mr. Campbell, Officiating Collector of Mymensingh, for disposal. He upheld the boundary line so laid down by the Survey, and held it to be the extreme limit of Pergunnah Shooshung.

Upon appeal to the Commissioner of Dacca, that decision was upheld on the 19th of November, 1859; and it was also upheld by the Board of Revenue on the 22nd May, 1862, upon a further appeal to them.

The plaintiff filed this suit on the 4th December, 1862. It was originally filed in the Court of the Principal Sudder Ameen of Mymensingh. He held that, in consequence of the order of Government made under Regulation X of 1822, to which I shall have to refer presently, the Government was entitled to separate the land claimed by the plaintiff, and that it must be considered to be within the district of Gowalparah, and beyond the jurisdiction of the Mymensingh Court. The plaint was therefore returned, and it was afterwards presented in the Court of the Deputy Commissioner of Gowalparah, who held that, as the lands in dispute had been made over to the special tribunal appointed by Regulation X of 1822, the Civil Court had no jurisdiction, and he dismissed the claim.

The case was appealed to this Court, and on the 4th August, 1865, Mr. Justice Kemp and Mr. Justice Seton-Karr, for reasons in which I substantially concur, held that the Civil Courts were not ousted of jurisdiction, reversed the decision of the Deputy Commissioner of Gowalparah, ordered the case to be tried before the Judge of Mymensingh upon the merits, and transmitted the case to him for that purpose.

The case was tried by Mr. Simson, who, on the 11th June, 1866, decided in favor of the plaintiff. A regular appeal was preferred from the judgment of Mr. Simson to this Court, which was heard before Mr. Justice Seton-Karr and Mr. Justice Macpherson. Mr. Justice Macpherson was of opinion that the decree of Mr. Simson ought to be reversed with all costs, both in this Court and in the Court below subsequent to the remand order. Mr. Justice Seton-Karr, who was the senior of the two Judges, considered that Mr. Simson's judgment ought to be affirmed substantially, and the appeal dismissed with costs; and in consequence of the decision of the senior Judge, the appeal preferred by the Collector on the part of Government was dismissed with costs.

From that decision an appeal was preferred to the High Court under Section 15 of the last Letters Patent, and the case has been argued before us.

It appears to me that there are four questions to be determined:—

First, whether the boundary line has been correctly laid down; *secondly*, if not, whether we can set aside the proceedings of the survey; *thirdly*, whether the plaintiff is entitled to all the lands which he claims between the line as laid down in the survey map, and what the plaintiff claims as his northern boundary; and, *fourthly*, whether the jurisdiction of this Court has been taken away by the order made by the Bengal Government under Regulation X of 1822.

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As to the last question, the Court has already expressed its opinion, when it was raised by the learned Advocate General, as a preliminary objection. I then expressed the reasons for considering that the jurisdiction of the Court had not been taken away, and I see no reason to change the opinion which I then expressed. It is in accordance with the opinions expressed by Mr. Justice Kemp and Mr. Justice Seton-Karr when they remanded the case.

I would add to the reasons which I then expressed, that the proviso in Section 8 does not authorize the Government to separate any part of the Garrow tract of country beyond that which is described in Section 2 from the district and from the general Regulations, but merely to direct the separation, temporarily or permanently, of any tract of country occupied by Garrow mountaineers from the estates of any neighbouring zemindars, and to discontinue the collection by zemindars of any cesses from such people. But the separation contemplated by that proviso, if carried into effect, would not remove the lands separated from a zemindary, like the tract included in Section 2, from the general Regulations as regards the administration of civil and criminal justice, nor does it authorize the Government to place the administration of civil and criminal justice in the lands so separated from a zemindary in the Civil Commissioner for the North-East parts of Rungpore appointed by Section 3. Such Commissioner is authorized to administer justice only within the tract described in Section 2.

If, therefore, the proviso in Section 8 applied to the separation of lands beyond the district mentioned in Section 2 from the general Regulations, there would be no power to administer justice in the lands so separated, nor any officer authorized by law to administer it. Further, whatever may be the effect of the proviso in Section 8, it is clear that the jurisdiction of the ordinary Civil and Criminal Courts is not taken away, except within the tracts of country mentioned in Section 2.

Clause 2, Section 8 of the Regulation above referred to, enacts that no suit or action shall be entertained by any Civil Court having jurisdiction, or that may hereafter have jurisdiction within the tract of country subject to the authority of the Commissioner, on account of any act of the above description done under the authority of the Governor-General in Council.

Further, upon the removal of any portion of a zemindary under the proviso of Section 8, the Government was to make compensation to the zemindars; but the compensation to be made would be very different in the case of taking away a portion of the estate of a zemindar under that proviso, from what it would be if the right of the zemindar to collect certain cesses only was discontinued.

The jurisdiction of the Civil Courts, by Clause 2 of Section 8, is taken away only with respect to acts of the description above enumerated done under the authority of the Government; but that would not take away the right of a zemindar to contest a survey award drawing a line which takes away from him part of his zemindary, and saying that the lands above that line form no part of his permanently settled estate. That is the ground of action in the present case, and that is not an act of any description mentioned in Regulation X of 1822.

With these additions to the reasons which I expressed in the course of the argument, the opinion will stand as part of this judgment. It is not necessary to repeat it.

I will now consider the first question, *viz.*, whether the boundary line drawn by the survey correctly points out the northern boundary of the plaintiff's permanently settled estate. It appears to me that it does not.

The firmans which have been put in evidence do not show the boundaries of the plaintiff's estate, but they show that the zemindary of Pergunnah Nusruthshahye, otherwise called Shooshung, had been granted to the plaintiff's ancestors by the Native Government prior to the East India Company's accession to the Dewanny. It is not necessary to rely upon these firmans for any purpose beyond that of showing that the estate was co-extensive with Pergunnah Shooshung

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It has been shown that the estate called Shooshung was permanently settled with the ancestors of the plaintiff upon a mokururee jumma, and there can be no doubt that the estate, which was settled permanently at a mokururee jumma, was the same estate which was held under the firmans from the Native Government, and was co-extensive with Pergunnah Shooshung.

Indeed, on the sixth ground of appeal to the High Court from the Judge's decision, it is stated that the papers filed by the Government show a settlement was entered into with the Rajah's ancestors for the lands of Pergunnah Shooshung.

The quinquennial register of 1202, which was put in evidence, gives the name of the estate as Shooshung, but does not describe the villages as it ought to have done, according to the provisions of Regulation XLVIII of 1793, Section 7, Clause 5, which enacted that, under the head of each estate, the names of all the pergunnahs, or other local divisions, and the villages contained therein, should be specified.

The first quinquennial register was to be made in the year 1202, B. S., corresponding with the year 1795 of the Christian era, and that was to be numbered 2. Another register was to be formed for the year 1197, corresponding with 1790, which was to exhibit the villages of the estates as they existed at the time of the decennial settlement, and that register, when made out, was to be numbered 1. A third register was to be made out for the year 1207, corresponding with 1800, and every five years subsequently.

The quinquennial register provided by Regulation XLVIII of 1793 was a register of estates. If the estate of the plaintiff's ancestors included the Garrow Hills, it is not improbable that there would be difficulty in giving a description of all the villages included in it in the register of 1202, and probably the description of the villages was left, until further information should be obtained of the state of the pergunnah, as it existed at the time of the decennial settlement, for the purpose of register No. 1. Be that however as it may, it is clear that the register did not comply with the requirements of the Regulation of 1793; but it must be borne in mind that it was the duty of the Collector, who was an officer of Government, to make it out.

Regulation VIII of 1800 repealed the provisions of Regulation XLVIII of 1793, so far as it required the quinquennial register of estates to specify the names of the villages included in them; it required a quinquennial register of pergunnahs in addition to the quinquennial register of estates. That pergunnah register was to give the names of the villages in the pergunnah; and when that portion of the Regulation of 1793 which required the names of the villages to be given in the register of estates was repealed, it was stated that a reference to the pergunnah register would always enable the officers of Government to ascertain the several villages and portions of villages of any estate included in the register of estates. (*See* Section 11, Regulation VIII of 1800.) If the two registers had been properly kept up by the Collectors as required by law, many difficulties, both in this and other cases, would have been avoided.

The first pergunnah register was to be made out for the year 1207, corresponding with the year 1800. Both the register of estates and the pergunnah register were to be made out by the Collector, who had power to call upon the zemindars to give him the necessary information, and the zemindars were bound to do so under a penalty to be inflicted by the Governor-General in Council. The register was to be signed by the Zillah Judge, and a copy sent by the Collector to the Board of Revenue and to the Zillah Courts for information, and the Board of Revenue was to send a copy to the High Court for a similar purpose.

A document was put in evidence which was stated to be a quinquennial register for 1207, and that document contains the names of certain villages as the villages of Pergunnah Shooshung. Up to the close of the argument, I was under the impression that it was the pergunnah register of 1207. If that document had really been a quinquennial register, it would have been strong evidence against the Government, from whose Collector's records it came, that Pergunnah Shooshung contained the villages enumerated in it.

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The Judge, in his judgment in this case, says that the kyfeut of the Collector's Amlah of the time shows that the date of the deposit of the document with the Collector is uncertain, and that it was found at arrangement of the records, which took place in 1224 or 1817. There is nothing to show under what circumstances that kyfeut was written, or what means of knowledge the writer of it had.

Assuming that the document was not a quinquennial register, it came, at any rate, from the Collector's Office, where it has been preserved at least ever since 1817, without any dispute as to its correctness, and is some evidence against Government that the Pergunnah Shooshung did contain those villages. If it had contained a false representation, or was considered so by the Collector at the time, there is no reason why it should have been preserved. Further, the document was treated by the Officiating Collector of Mymensingh in his roobokaree which he sent to the Revenue Commissioner of Assam, dated the 22nd September, 1837, as a document worthy of some credit. He there says:—"In the quinquennial paper of 1207, which specially contains the names of the *paras* or hamlets which are recorded in the first quinquennial papers, the villages of Lekhung and Dano Ryuk, which are the *paras* or hamlets of Mouzah Aghur, and which is recorded in the first quinquennial papers, have been distinctly written." These are on the north side of the boundary laid down by the survey.

I do not think that much importance can be attached to the letter of Mr. Wroughton, the Collector, as to the state of the pergunnah prior to the settlement, for there is considerable ambiguity in his expressions; but we have the letter of Mr. Scott, the Collector, to the Board of Revenue, dated the 24th of May, 1820, in which, with reference to the question as to whether a Canoongoe should be appointed to this zemindary, he evidently considered that the zemindary extended into the Garrow Hills; for he says:—"The introduction of a new system of Canoongoe or Putwarees among them (speaking of the Garrow people) would, I think, be liable to many objections. I am inclined to believe that they pay no fixed rent, either in money or in kind, to their landlord." He certainly did not mean the Government when he used the word "landlord." The word evidently referred to the zemindar. On the other hand, he saw no reason for introducing the office of Canoongoe into that part of the estate which was in the low country.

It appears further that, in the year 1837, a Sub-Assistant was deputed from Gowalparah with a party of sepoys to collect arrears of tribute which had been withheld by certain refractory Garrows. Upon that occasion certain rents were collected from the Garrows for villages on the north side of the boundary line laid down, upon which the Rajah instituted a suit against Government in the Court of the Revenue Commissioner of the Province of Assam; and it appears that, for the purpose of ascertaining whether the villages belonged to the Rajah or not, a rooboocaree was sent from the Cutcherry of the Commissioner of Zillah Gowalparah to the Collector of Mymensingh. An answer was sent by the Collector of Mymensingh to that rooboocaree, in which, as I have before remarked, he referred to the papers of 1207 as a quinquennial register. He stated that "the evidence of witnesses had been taken," and proceeds to state that "from their evidence it appeared that the Mouzahs Lekhung and others are the *paras* or hamlets of Mouzah Aghur recorded in the quinquennial papers; that many other mouzahs are situated in the hills appertaining to the zemindary of the Rajah; and that the hills and mouzahs and kismuts, which are bounded by the Nittie river on the west, Bellei river and the state of the Khashia Rajah on the north, and the river Moheshkhola on the east, are included in the Rajah's zemindary, and he is in possession of them for generations."

A rooboocaree was also sent to the Political Agent for the Cossyah Hills, and Mr. Henry Inglis, the Assistant Political Agent, reported in favor of the Rajah's right to the villages which were under dispute in the Commissioner's Court.

A perwannah was also sent to some neighbouring proprietors on the western boundary, and they replied that they did not claim any portion of the hills.

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Finally, on the 17th of March, 1841, the Revenue Commissioner of Assam decided that the order of the Collector releasing Mouzahs Lekhung, Shirkeejhora, and others in question to the possession of the plaintiffs from the claim of Government to realize rents, and allowing a refund to them of the rents realized from those Mouzahs, was, in his opinion, correct.

With reference to this order, Mr. Campbell, in his order of the 15th April, 1859, which is one of the matters impeached in this action, says:—"It is quite true that they," speaking of the Gowalparah authorities, "did argue, and indeed declare, that the hills belonged to the permanently settled Pergunnah Shooshung; but such a declaration can carry no weight, so far as Mymensingh is concerned. They had perfect power to decide that the villages did not belong to Gowalparah; but no one but the Mymensingh authorities could decide that they were within the limits of the permanently settled estate of Pergunnah Shooshung." But if they are not in the Gowalparah district, and are in the Mymensingh district, are they included in Pergunnah Shooshung? It is not pretended, on the part of the Mymensingh authorities, that there is any other pergunnah or district, or part of a district, in Mymensingh to the north of Pergunnah Shooshung. This point was very properly pointed out by the Judge in giving judgment on the appeal before him. He appears to me to have given a very sensible judgment on the whole case, and I concur in many of his remarks, though upon one point he appears to have fallen into error, as I shall presently point out. But it is to be further remarked that the decision of the Revenue Commissioner of Assam was given after considering the roobocaree of the Officiating Collector of Mymensingh, dated 27th September, 1837. Of the three officers of Government, the Collector of Mymensingh, the Assistant Political Agent of the Cossyah Hills, and the Revenue Commissioner of Assam, all of whom knew of the proceedings before the Commissioner of Assam, none of them claimed the lands in dispute, and the Revenue Commissioner of Assam ordered the rents which had been collected to be refunded to the Rajah.

Some time after the decision of the Commissioner of Assam, it appears to have been represented to the Board of Revenue that the Rajah was capturing elephants in the forests north of the line which is now laid down, and the Board was asked by the Commissioner of Revenue for the Division of Dacca whether the Government order of the 14th of January, 1854, with reference to catching elephants, was to be enforced in those forests. Mr. Kemp, who was then the Collector of Mymensingh, was directed to enquire whether the forests were situate within or without the limits of the Rajah's permanently settled estate. Unfortunately, in this case, we have not a copy of the whole correspondence. We have sometimes letters without a copy of those to which they are a reply, and sometimes replies without the letters in answer to which they were sent. We have not therefore all the light which might have been fairly thrown upon the case by the Government Officers; but we find from Mr. Kemp's letter of the 25th of August, 1854, to the Commissioner of Dacca, what was the belief of the Board of Revenue at that time upon the subject; and that was, that the forests where the elephant catching was going on were within the Rajah's permanently settled estate. He says:—"The Board, in reply, observe that if, as they believe, the Rajah's estates (meaning the forests) came within the limits of the permanent settlement, there would be difficulties probably in dealing with the question of elephant catching there, which do not occur in dealing with it in the forests of Sylhet."

Mr. Kemp, who was then the Collector of Mymensingh, reported in substance, as his predecessors had done, that the Rajah's forests were within the limits of his permanently settled estate. We have therefore the opinion of Mr. Scott, the Collector, on the 24th of May, 1820; the report of the Officiating Collector of Mymensingh of the 27th of September, 1837; we have the paper, called a quinquennial register, of 1207, upon which no Collector has ever attempted to cast discredit; we have the report of Mr. Henry Inglis, the Assistant Political Agent of the Cossyah Hills; we have the decision of Mr. Jenkins, not only deciding in favor of the plaintiff, but ordering rents which had been

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collected from the Garrows by the revenue authorities of Assam to be returned to the Rajah; we have the report of Mr. Kemp, the Collector of Mymensingh, to the same effect in 1854, and if Mr. Kemp's report is correct as to the Board's reply to the Commissioner of Revenue of the Division of Dacca, of which a copy has not been put in evidence, we have the belief of the Board of Revenue that the forests north of the disputed line belonged to the Rajah's permanently settled estate. Mr. Kemp's letter must have been sent to the Board of Revenue, and there is nothing to show that they ever repudiated the statement that they had expressed that belief. Yet we find, from the decision of Mr. Campbell, on the 15th of April, 1859, that, notwithstanding the Rajah had exercised rights, and collected dues in the hills and forests north of the alleged line, notwithstanding unanimous opinions of all the officers, and even of the Board of Revenue, that the forests were within the Rajah's permanently settled estate, it was determined by the Superintendent, the Board, and the Government, that a demarcation line should be assumed as the boundary of the pergunnah which should exclude those hills and forests from the Rajah's estate; that the *onus probandi* should be thrown on him as to any portion of the hills to which he might lay claim north of that line. The line was accordingly drawn, the case was transferred by the Board to Mr. Campbell, the Collector of Mymensingh, and in an anomalous kind of proceeding of a judicial character, Mr. Campbell decided against the Rajah. His order was affirmed upon appeal by the Commissioner of Revenue, and finally upheld on appeal in a proceeding of a judicial nature by the Board of Revenue, who, contrary to the expressed belief of the Board of Revenue, had ordered the line to be assumed, in order to throw the *onus* on the plaintiff. I must say that the proceeding appears to me, to say the least of it, to have been one of a very arbitrary and anomalous character.

On the 23rd of March, 1861, after the decision of Mr. Campbell and of the Commissioner, and before the decision of the Board of Revenue of the 22nd of May, 1862, Mr. Seton-Karr, as Secretary to the Government of Bengal, wrote to the Agent of the Governor-General on the North-East Frontier:—

"The specific recommendations made by Lieutenant Morton, in all of which Colonel Jenkins has expressed his concurrence, are as follows:—

First, to extend to the Garrow villages, on the frontiers of the Mymensingh district, the same system of revenue collection as is adopted in the Garrow mehals of the Gowalparah district, or, as Colonel Jenkins expresses it, to take all the Garrow villages from which the zemindars of Sherepore and Shooshung claim to have the right of taking revenue under the direct management of Government, the Government officer collecting the revenue, and paying it over to the zemindars. As this arrangement has worked well in Gowalparah, the Lieutenant-Governor sees no reason to doubt that it would work as well on the other side of the hills, and the Commissioner of Dacca will be requested to adopt measures for its immediate introduction into Mymensingh."

From this paragraph it is clear that the right of the zemindar to collect the revenue was not even disputed by the Government. The Government officer was to make the collections, but he was to pay them over to the zemindar, which would not have been the case if the lands had not been included in the zemindary, and the zemindar had no right to them. Consequently, it seems clear that, when the Commissioner of Dacca was requested to adopt measures for the introduction of the system of revenue collection alluded to in the letter into Mymensingh, it was admitted that this part of the Garrow Hills was in zillah Mymensingh and in the Rajah's estate. This letter was written before the decision of the Board on the appeal.

But after the decision of the Board of Revenue, Mr. Gordon, as Officiating Junior Secretary to the Government of Bengal, writing to the Officiating Commissioner of Assam on the 18th November, 1832, says:—"This is not, the Lieutenant-Governor observes, a question of disputed boundary, but a question as to the right of the zemindars of Sherepore and Shooshung to collect

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revenue from the Garrow villages on the north side of the Mymensing boundary, and within the limits of the Garrow country under the administration of the Deputy Commissioner of Gowalparah. In other words, the lands in the Garrow country in which the revenue was to be collected by Government, and paid over to the Rajah, are now said not to be in Mymensinghat all, but to be to the north of the Mymensingh boundary, under the administration of the Deputy Commissioner of Gowalparah." If so, they are out of the permanently settled estate of the Rajah in Zillah Mymensingh. It has been decided, however, by Mr. Jenkins, the Commissioner of Assam, that they were not in Assam, and he ordered the rents collected to be returned to the Rajah; and then Mr. Campbell held that the Gowalparah authorities, although they had a right to decide that the lands were not in Gowalparah, had no right to decide that, if in Mymensingh, they had been permanently settled.

If they are not in Mymensingh, where are they? The plaintiff's boundary and the boundary of Pergunnah Shooshung are conterminous. If that portion of the estate which is claimed by the Rajah is not in Pergunnah Shooshung, it is not in his permanently settled estate; and if, by the assumed line drawn by directions of the Board of Revenue and the Government of Bengal, the lands are put out of Pergunnah Shooshung, they are at the same time put out of the permanently settled estates of the Rajah; so if the lands are put out of Zillah Mymensingh, they are necessarily put out of the Rajah's permanently settled estate, which was settled with him in Pergunnah Shooshung, Zillah Mymensingh.

In the 3rd paragraph of the letter to which I last referred, it is said:—"The Lieutenant-Governor is not aware that there is any doubt as to the exact boundary between the district of Mymensigh and the Garrow country. But, be that as it may, His Honor directs that all lands to the north of the boundary, as laid down in the Revenue Survey map, may be separated from the estates of the zemindars of Sherepore and Shooshung, and managed by the Deputy Commissioner of Gowalparah, as directed in Section 8, Regulation X of 1822."

When the plaintiff commenced his suit to try the question whether the line of boundary, as laid down in the survey map, was correct, it was contended that the Civil Courts had no jurisdiction. If not, the line assumed by the Board of Revenue, and laid down as the northern boundary of Zillah Shooshung, can never be disputed, and the plaintiff must be bound by the decision of the Board of Revenue, who, having ordered the line to be assumed for the purpose of throwing the *onus* on the Rajah, decided, in their capacity of the highest Court of Appeal in revenue matters, that the line which had been assumed was the correct one. Even if the Government had had the power, under Regulation X of 1822, to separate any portion of the plaintiff's estate from the remainder, and to place it under the Commissioner of Gowalparah, the plaintiff would have been entitled to compensation under the Regulation. But the amount of compensation might be very different if the Rajah were the owner of the soil as part of his permanently settled estate, from what it would have been if he were merely entitled to some incorporeal rights over it.

I do not understand under what Regulation the proceedings of the revenue authorities can be, or are attempted to be, justified. If those proceedings were adopted under Regulation IX of 1825, Section 5, Clause 12, they were wholly irregular, inasmuch as the *onus* of proof was thrown upon the Rajah, not by an independent opinion of the Collector, but by an act done in which the Board of Revenue took the initiative. Having ordered the line to be assumed and drawn as it was, they sent the case to the Collector for disposal. If the lands are in Gowalparah, how could the case be sent to the Collector of Mymensingh? It is not necessary that the proceedings should be regular in order to give the Civil Courts jurisdiction to set them aside. The more arbitrary and irregular the proceedings, the more necessary is the interference of the Civil Courts to prevent them from working injustice. The form of a proceeding, in its nature judicial, was gone through; and if wrong,

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the irregularity of the proceedings can be no ground for excluding this Court from examining them. If the proceedings had been regular, this Court would have had jurisdiction. That jurisdiction cannot be excluded by the irregularity of them.

We therefore have power to look into the facts, and to decide upon the plaintiff's rights. Judging from the parol evidence which has been adduced in the cause, the opinions expressed by the various Collectors of Mymensingh, and the decision of the Revenue Commissioner of Assam, we are of opinion that the line assumed and laid down in the survey map was not correct.

There can be no doubt, from the parol evidence, that some rights were exercised by the zemindar in portions of the forests and lands much to the north of the assumed line. Whether the payments which he received from the Garrows for the Shungs are to be considered as payments of rent or not, I think it is clearly proved that payments of some kind were made to the Rajah by the Garrows in respect of the Shungs and other matters.

There can be no doubt that when the revenue authorities of Assam interfered, and, accompanied by sepoys, compelled payment from the Garrows, such payments were claimed and received as rent Having been received as rent, the amount was ordered by the Revenue Commissioner of Assam, in a suit by the Rajah against the Government, to be paid to the Rajah.

The cutting of timber would be strong *primâ facie* evidence of an act of ownership. If it were in the exercise merely of a right to cut timber, how did the latter right originate, and who are the owners of the soil over which such right was exercised? One question is whether the acts done by the Rajah and his ancestors on the north side are to be treated as mere unwarrantable encroachments by a wrong-doer, or to be taken as the exercise of rights; and if they are to be attributed to the exercise of rights, whether such rights were rights of ownership in the soil, or mere incorporeal rights over the soil of another.

In a case of disputed boundary, if you find a man exercising rights of ownership on the one side, and on the other side of the disputed line of boundary doing, without objection, acts which may be attributed either to ownership or to the exercise of incorporeal rights, such as the right to cut timber and other rights of that nature, they must, I think, be *primâ facie* attributed to ownership, especially when, as in the present case, the rights exercised are all which, according to the nature of things, an owner would, or probably could, exercise, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was ever made during a long course of years. They certainly cannot be treated as the mere encroachments of a wrong-doer, without showing that some one else was the owner of the soil, and that he objected. There can be no doubt that the Government permanently settled some lands with the Rajah's ancestors. The boundary only is in dispute. We find the Rajah and his ancestors for a long course of years doing acts which may be attributed either to ownership or to the exercise of incorporeal rights on the north side of the disputed boundary line. It is not shown that the Government or any other person ever objected to such acts.

I cannot, in the absence of all evidence to the contrary, attribute those acts to anything but to ownership, and I am of opinion that the Rajah has proved that the line laid down in the survey map was not correct, and that his permanently settled estate includes lands much to the north of that line, and I am opinion that the plaintiff ought to have a declaration that he is not bound by the line so laid down as the boundary of his estate.

In the course of my remarks on the second question, I have indirectly given my opinion on the third point, *viz.*, that this Court has the power to set aside the survey proceedings, although they were irregular. But it does not follow that, because the plaintiff is entitled to lands to the north of the boundary line laid down, he is entitled to all the lands up to the line which he claims as his northern boundary. The Judge of Mymensing has, in my opinion, fallen into an error in deciding that, upon the evidence, the plaintiff is entitled to the

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lands up to the boundary line which he contends for. He has not merely declared that the line drawn by the survey authorities is not the northern boundary of Pergunnah Shooshung, but he has proceeded to declare that the right and title of the plaintiff in the land claimed is established; that is to say, that he is entitled up to the hills lying to the north of the villages Aboollgiri and Senseugiri. There is no sufficient evidence to prove such a right, or to enable us to declare with certainty what is the correct boundary of the plaintiff's estate.

Mr. Justice Seton-Karr also seems to have fallen into an error similar to that of the Zillah Judge. He—says "Even if it be conceded for Government that the Rajah has not shown, by precise documentary evidence, that this hill tract actually formed part of the assets of his estate at the perpetual settlement, I would still say that he has shewn a prescriptive right to collect and receive tribute from the tract in question, and that the Government, in opposition to the case which he has set up, has shewn literally nothing to debar him from the future exercise of those rights"

But that is not what the plaintiff claims. He does not merely claim certain incorporeal rights over the lands to the north of the line laid down in the survey map, but he claims to be entitled to the lands up to the northern boundary described in his plaint as part of his permanently settled estate, and it appears to me that he has failed in proving his case to that extent. Mr. Justice Seton-Karr proceeds:—"I would simply confirm the judgment of the Lower Courts, and declare the Rajah entitled to the privileges and dues which he has always enjoyed till a recent date. It is obvious that the collection of those cesses, however primitive, irregular, and uncertain, may form an important part of the plaintiff's income. Dealing with the case as a judicial tribunal ought to deal with it, I have only to say that I think the judgment ought to be affirmed substantially, and the appeal dismissed with costs."

It appears to me that Mr. Justice Seton-Karr, although right in other respects, has fallen into a mistake in declaring that the plaintiff is entitled to the lands as part of his permanently settled estate, merely because he considers that he has a right to the privileges and dues which he has enjoyed. I am of opinion, therefore, that the decision of the Zillah Court and of the Division Bench ought to be modified, and that it ought to be declared that the line laid down by the survey as the northern boundary of the plaintiff's estate is not the correct boundary line, and that the plaintiff is not bound by the survey proceedings, and that that part of the decision of the Zillah Court which declares that the plaintiff is entitled to the land claimed should be reversed. In other respects the decision of the Lower Court is affirmed. Although the plaintiff has, in my opinion, shown that he is entitled to some lands to the north of the boundary laid down, he has failed to prove, to my satisfaction, that he is entitled to the lands up to the boundary line which he claims. That being the case, I can only declare that he is not bound by the line laid down, and not that he is entitled up to the boundary which he has claimed.

It appears to me that the appeal must be allowed; that the decisions of the Lower Court and of the Division Bench of this Court must be reversed, so far as they declare that plaintiff is entitled to the lands specified in the plaint; and that we must merely declare that the boundary line laid down in the survey map as the boundary line of his permanently settled estate is not the true boundary line, and that the plaintiff is not bound by the survey map or by the order of the Collector of the 15th April, 1859, and the subsequent proceedings thereon. The Government has failed substantially in the suit. They ought to pay the costs of this appeal to the High Court, and the appeal from the first Division Bench to this Court.

The result is that the Government will pay all the costs in the Lower Court and in this Court.

Jackson, J.—I concur with the Chief Justice on all the points.

Phear, J.—I substantially agree with the Chief Justice on all the points. But I confess that I have, during the course of the case, felt very much

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difficulty as to what was the exact cause of action which we have been trying, and I am still not without hesitation as to the propriety of the form of decision which the Chief Justice and my brother Jackson think is correct.

If the plaint itself alone be looked at, it is, I think, almost impossible to say that anything actionable on the part of the defendant, that is, the Government, is there disclosed. The written statements that I have seen afford no aid whatever with regard to this point, and it is only now, at the last moment, that I have been able to discover there were issues settled between the parties. But from the course the litigation has taken in the different Courts, and from the arguments of the Counsel before us, I came to the conclusion, which I believe to be substantially correct, that plaintiffs' intended ground of complaint is this, *viz.*, that the Government, who settled Pergunnah Shooshung with his ancestors, have wrongfully drawn a boundary line cutting off a portion of the estate so settled, and have forbidden the plaintiff the enjoyment of zemindary rights in the portion beyond and on the hill side of that line. If this be so, I think that that constitutes a cause of action upon which the plaintiff can ask for a declaration of right under Section 15, Act VIII of 1859, because it constitutes a cause of action upon which he could have come to a Civil Court for relief independently of that Section.

But it seems to me that a declaration of right to be made under Section 15, in the contemplation of the Legislature, must be such a specific right as the Court would be obliged to arrive at, and find to exist in the case, before it would be justified in giving other relief than a mere declaration of right itself.

I think therefore that, if we come to the conclusion in this case that the Government has committed a wrongful act, we ought to specify distinctly the proprietary right which we consider that the plaintiff has established beyond the line wrongfully drawn by the Government, and has shewn to be violated or threatened by the drawing of that line. This is the right which I suppose he asks us to declare, because I do not think, that he could, under the Act, ask for the declaration of any other right than that which is attacked by the defendant's wrong-doing. The specification of such a right necessarily involves a specification of the locality or area over which it extends. Indeed, it seems to me that a proprietary right is not fully defined until at least the property to which it relates is indicated. To say that a claimant has the right to possession of some land beyond a given line, without giving any clue to the specification of that land, appears to me to be as vague and indefinite as if the declaration had simply been that he was entitled to some sort of proprietary right, and had gone no further towards distinguishing it.

It seems to me, too, that we shall be doing much to encourage great additional and mischievous litigation if we hold that Section 15 does in effect create a cause of action. For if this Section justifies the indefinite declaration of right, which is now proposed to be made, it justifies the plaintiff in coming into Court with just so much materials, and no more, as will be enough to lead to such a declaration, and to my mind this will be a cause of action which Courts have not hitherto recognised as sufficient. Thus, for instance, it will be always competent to a plaintiff who is desirous of bringing a possessory action to confine himself, in the first instance, to bringing a suit to obtain a general declaration that his possessory rights extend beyond, or exist within, a specified boundary, before he makes up his mind to bring a suit to obtain possession of any definite area of which that boundary may be a part definition.

For my own part, I am prepared, on the facts of this case, to go beyond the decision of my colleagues. I am prepared to declare that the plaintiff has proprietary rights in certain specified villages beyond the disputed line. That the Government line is wrong, and that the drawing of it has been a wrongful act on the part of the Government, I have no sort of doubt. Indeed, I think that the Chief Justice has clearly pointed out that the act was most arbitrary and high handed.

The evidence, with which the Chief Justice has so fully dealt, is, to my mind, absolutely conclusive against the line being the northern boundary of the Pergunnah which was settled with the plaintiff's ancestors. No doubt, if a proprietary right is to be proved by user alone, it must be always remembered that any particular acts of user are only evidence of just so large a right as will justify the act of user. If an easement will suffice for that purpose, the right of easement is all that the evidence proves. But when acts of user of different kinds are established, such that they can only be justified by attributing them to several easements, then it becomes matter of consideration, on the facts of the case, whether they are not rather referable to the one paramount right of ownership than to several minor rights of easement; and the best guide to a conclusion on this point is that which, I believe, the Chief Justice has before laid down in this Court, and which is certainly to be found in many of the decisions of the Courts at Westminster, *viz*, this, to see whether or not acts of user exhibit all the modes of enjoyment which under the circumstances of the case it would be reasonable to expect would be displayed in regard to the property.

To English lawyers a familiar example is that of the seashore between high and low water. If a person shows that he has always been accustomed to take sand from it, that alone may be justified by presumption of a grant to take sand; and so with seaweed, mooring dues, or any other single act of enjoyment. But if he shows that he has been accustomed to do all these things, or a large number of them, it would be proper for the Jury to infer that he did so by reason of a right of ownership, rather than because he had originally obtained so many separate grants.

So here, if the acts of enjoyment which Mr. Justice Seton-Karr appears to think illustrated all the modes of enjoyment of which this disputed property could reasonably be expected to be capable, then I think that the learned Judge would have been right had he drawn the conclusion of facts that those acts of user were attributable to proprietorship of the tract upon which they were exercised; and in that case his confirmation of the judgment of the Lower Court would have been unimpeachable, had he also gone on to specify that he found that these acts were done, and the enjoyment had, throughout the whole of the area, been claimed by the plaintiff. As, however, he did not draw that inference of fact, but came only to the conclusion of Mr. Justice Macpherson, that nothing more than the particular rights which Mr. Justice Macpherson found had been made out by the plaintiff, I cannot understand, I confess, how the Senior Judge of the Division Bench could escape from the necessity of passing the judgment which Mr. Justice Macpherson recommended.

For my own part, I am not indisposed to say that, as a Juryman, I should have drawn the inference of fact from the evidence of user alone, which Mr. Justice Seton-Karr seems to have avoided; but I think, had there been any doubt left upon this point, so far as concerns the evidence of user, that is entirely removed by the documentary evidence in the case, showing the acts and acknowledgments of the Government Officials, and the fact that Garrow mehals in the hills were recognized as belonging to Pergunnah Shoosung, as well as the other Pergunnahs mainly lying at the foot of the hills, from the earliest period to which our evidence goes back.

It is perfectly unnecessary for me to support what I have just said by a detailed reference to the evidence itself, as that has been so effectively done by the Chief Justice.

I am of opinion that we ought to declare that the so-called boundary line drawn by the Government, confirmed by the various decisions of the Commissioner and Board of Revenue, which are sought to be set aside, is not the boundary of plaintiff's settled estate, Pergunnah Shoosung; and I think, further, that we ought to declare that the villages mentioned in the roobocarees of Mr. Irwin, Mr. Scott, and Mr. Inglis, and in the decision of Mr. Jenkins, form part of the settled Pergunnah Shoosung.

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CASE 1809 OF 1867.

Special Appeal from Backergunge.

Puree Jan Khatoon and others, (Plaintiffs) *Appellants, versus* Bycunt Chunder Chuckerbutty and others, (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Baboos Ashootosh Dhur, Hemchunder Bannerjee, and *Kallee Mohun Doss* for Appellants.

Baboos Unnodapurshad Bannerjee and *Onoocool Chunder Mookerjee* for Respondents.

The giving a declaratory decree is entirely in the discretion of the Court.

Where a case is remanded for trial on a specific issue, the Lower Court cannot re-open questions assumed by the Court above as determined. (E. Jackson, J., dissenting.)

This case was remanded on the 29th January, 1867, by Justices Trevor and Glover.

It appears there were originally two special appeals, numbered 2185 of 1866 and 2245 of 1866. The appellants in No. 2185 are now before us as special appellants in No. 1809. They were plaintiffs in the Zillah Court.

The plaintiffs in special appeal No. 2245 sued certain ryots under Section 10, Act VI of 1862, Bengal Council, for measurement of the lands in their occupation. The defendants in that suit pleaded that the lands did not belong to the plaintiffs, but to another party, the plaintiffs in No. 2185, special appellants in the case under consideration.

The Lower Courts on enquiry found that the plaintiff in No. 2245 had never been in possession of the lands, and therefore dismissed his suit. The special appeal No. 2245 proceeded on the ground that it was not necessary, in order to give him a right to measure, that he should be in actual possession, inasmuch as the right to possession was quite sufficient to entitle him to obtain what he asked for.

The learned Judges above referred to held that Section 10, Act VI of 1862, contemplated possession by the receipt of rent for those lands of which the measurement was required, and as plaintiff had not proved such possession, the Lower Court was quite right in dismissing his suit. Special appeal No. 2245 was therefore dismissed with costs.

With reference to special appeal No. 2185, which, we may observe, was heard and disposed of at the same time, and by the same decision as No. 2245, the learned Judges observed "that the plaintiffs sued, as in possession, for a declaration by the Court, under Section 15, Act VIII of 1859, of their right to certain lands, these rights having been placed in jeopardy by the act of the survey authorities, who measured and demarcated those lands as being within the defendants' estate. The Judge, accepting the plaintiff's statement as to possession, finds that, as more than six years have elapsed since the act complained of forming his cause of action arose, plaintiffs were out of Court under the Statute of Limitations."

The learned Judges proceed to observe "that the Statute of Limitations would not apply to a claim for a declaration of title, the *plaintiffs being in possession* of the land regarding which the declaration is required; that it is competent to the Court, however, to enquire whether the act complained of is so recent and of such a nature as to entitle plaintiff to a declaratory decree; for the Court will not be put in motion, under Section 15, Act VIII of 1859, unless some injury appear so probable as to lead to the conclusion that unless stayed by the declaratory decree, the inchoate or threatened injury may be completely perpetrated. If the Court is satisfied on this point, it will pass a declaratory decree, otherwise it will refuse the same."

With these clear and precise instructions, the case was remanded, with directions to pass orders in conformity with the same.

The Judge, on the remand, observes that the order of remand does not preclude him from entertaining and deciding the question of the plaintiff's possession, inasmuch as in his former decision he had only admitted the plaintiff's possession by way of argument. On the question of possession, the Judge was of opinion that there were very serious objections to the reception

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of the evidence as true which had been adduced by the plaintiff in support of his possession, inasmuch as in a former suit in 1856, to which the plaintiffs were parties, those documents had not been produced, though it was of the utmost importance to the plaintiffs to file all evidence that would bear on their case, and naturally it was to be expected that the documentary evidence on which the plaintiffs now rely should have been brought forward in 1856, and that therefore the only conclusion the Judge could come to was that the evidence was not then in existence, and is consequently spurious, and fabricated for the purposes of the present suit. Lastly, the Judge observes that even two of the plaintiff's own witnesses, namely, Ramcumul Sein and Sudderooddeen, who are also in the plaintiff's employ, support the defendant's claim. On the whole, the Judge thinks that the evidence upon which the plaintiffs relied could not be trusted, and that therefore, as they have not proved either their title or possession, their suit must be dismissed.

In special appeal it is contended—

First.—That as this suit was remanded by this Court for the sole purpose of enquiring into the point whether the act complained of was so recent and of such a nature as to entitle plaintiff, special appellant, to a declaratory decree, the Judge was not competent to re-open the question of possession, but should have confined himself to the issue upon which the suit was remanded.

Second.—That, even if the Judge were competent to re-open the question of possession, his decision is erroneous and defective, *first*, because the Judge is in error in supposing that in the suit under Act VI of 1862, Bengal Council, the question of possession was not determined in favor of the special appellant, and against the special respondent; *second*, because the Judge has improperly rejected the documentary evidence of the special appellant, on the ground that this evidence was not filed in the suit of 1856; for, according to the contention in that suit, it was wholly unnecessary to file these documents then. Moreover, only one of the plaintiffs in the present suit was a party to the suit of 1856.

Another ground is taken, to the effect that the Judge has misunderstood the evidence of the two witnesses, Ramcumul Sein and Sudderooddeen.

A cross-appeal is preferred by the special respondent, to the effect that the suit of the plaintiff for a declaratory decree would not, under the circumstances set forth in the plaint, lie, and that it ought to have been dismissed.

The cross-appeal of the special respondent was argued first. The pleader for the special respondent contends that the plaint discloses no cause of action, and that the plaintiff, special appellant, is not entitled to a declaratory decree under the provisions of Section 15, Act VIII of 1859. A decision of the second Bench, Justices Bayley and Phear, in No. 1164 of 1867, dated 25th February, 1868, which has not been published,* and a decision published in Wyman's Reporter, III, page 60, were quoted in support of the argument.

Section 15, Act VIII of 1859, runs thus:—"No suit shall be open to objection, on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Court to make binding declarations of right without granting consequential relief."

In the case No. 1164, cited by the pleader for the special appellant, Mr. Justice Bayley held that "no overt act of hostility, or attempt to take possession from the plaintiff in that suit," had been alleged in the plaint. It was merely suggested that the plaintiff might be injured by a certain demarcation made by the survey authorities; and that as the plaintiff had preferred no objection at the time of the demarcation to the survey authorities, although he had full notice of their proceedings, he was not entitled to relief under the provisions of Section 15, Act VIII of 1859.

Mr. Justice Phear added "that a plaintiff who seeks relief under Section 15 must make out, to the satisfaction of the Court, some act done by the defendants which is hostile to and invades his rights, and which would

* It *has* been published. Wyman's Reporter, V. 171. ED.

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justify an injunction or a decree for damages, or a decree for delivery of possession, or some other decretal order being passed against the defendants if the Court had so thought fit to exercise its discretion."

In the decision published in Wyman's Reporter, Vol. III, p. 60, the plaint was for a declaration, under Section 15, Act VIII of 1859, that the demarcation line set down in the survey map was wrong. The plaintiff in that suit had not appeared before the survey authorities, and pointed out that the boundary line was erroneous.

The Court (the Chief Justice and Mr. Justice Loch) held that it is discretionary in the Courts whether they will give a declaratory decree or not. Taking the circumstances of the case then before them into consideration, those learned Judges held that the case was not one in which justice required that such a decree should be made.

It is clear from these decisions that it is entirely in the discretion of the Court to grant relief under the Section, or to withhold it, and each case must be judged by its own particular circumstances. Is then the present case one in which the Court, exercising a wise discretion under the Section, ought to give relief? I am of opinion that it is.

The plaintiffs sue, not only on the allegation that the defendant has caused a demarcation to be made behind their backs, which takes a slice from their estate, and annexes it to that of the defendant, but that the defendant, under color of this proceeding, has sued the plaintiffs' tenants for rent under Act X, and has proceeded against them to enforce a measurement under the provisions of Act VI of 1862, Bengal Council. These are acts which, in my opinion, are hostile and obviously injurious to the plaintiffs' title, and I would hold that the suit, under Section 15, will lie. The cross-appeal ought, in my opinion, to be dismissed with costs and interest.

On the grounds taken by the special appellants, I think that the decision of the Judge ought to be reversed.

The order of remand distinctly proceeded on the assumption that the special appellants were in possession. Had there been any argument as to the question of possession before the remanding Judges, their judgment would have taken notice of such argument. The judgment observes that the Judge "accepted the special appellant's statements as to possession," but thought the claim barred under the Statute of Limitations. The learned Judges proceed to observe that the statute does not apply to a claim for a declaration of title, "the plaintiffs being in possession of the land regarding which the declaration is required." Words cannot be clearer.

The Judge, without touching the point for which alone the suit was remanded, re-opened the whole question of possession. In doing this, I think he was clearly wrong, and that he acted in opposition to the orders of this Court.

I am further of opinion that, even admitting for argument's sake that the Judge was competent to re-open the question of possession, he was clearly wrong in rejecting the evidence as to possession adduced by the special appellants, simply because it had not been filed in a previous suit in 1856.

In the first place, all the special appellants before us were not parties to that suit. Only one of them was a party. He sued on the footing that he had purchased a 2-anna share of the property in dispute in that suit; that his vendor, withholding the rent, caused a sale of a 4-anna share of the property which included the plaintiff's 2 annas, and the suit was to recover a 2-anna portion of the sale proceeds in deposit.

The defendant's plea, while admitting execution of the bill of sale, was that the sale of the 2 annas to the plaintiff in the suit of 1856 was a conditional one, subject to his taking certain proceedings to adjust a decree; that failing to carry out those conditions, the sale fell through; and that therefore the plaintiff in that suit had no title to any of the sale proceeds.

In such a suit it does not appear to me that it was at all essential to prove plaintiff's possession. All he had to prove was that the 2 annas really passed to him by an unconditional sale. It may be that his vendor had not put him

in possession of any title-deeds, and that therefore, in 1856, the plaintiff was unable to produce them. But, be that as it may, he was not bound to produce them in that suit as the proceedings stood. And they ought not to have been summarily pronounced, to be manufactured for the purposes of the present suit, simply because they were not filed in 1856. Moreover, the position of the plaintiffs, special appellants, is very much changed since 1856. They are now the maliks by purchase and otherwise of the whole 16 annas of the property which was the subject of litigation in 1856. The two witnesses for the plaintiffs do not support the defendant's case. They make a mistake in the name of the talook, which is so far favorable to the defendants' claim, but their evidence, taken as a whole, is clearly hostile to the defendants; and reading the whole evidence, as also from the context, it is clear that the name of the talook was a pure mistake.

In this view I would reverse the decision of the Judge, and decree both this appeal and the plaintiffs', special appellants' suit, with costs of all the Courts, bearing interest.

There being a difference of opinion between us, the opinion of the senior Judge will prevail.

Jackson, J.—I am also of opinion that a sufficient cause of action has been put forward by the plaintiffs, special appellants, and that the Judge was therefore right to entertain this suit, and proceed to try it.

There are some rulings of this Court that a mere demarcation in a Government survey map does not afford a sufficient cause of action to a person who alleges that a portion of his land has been demarcated in the map of another estate. But in this case the defendant took other steps to enforce his right to the land so demarcated, and such acts were hostile and injurious to the rights of the plaintiffs, and afford him a sufficient cause of action.

I cannot, however, concur with my learned colleague that the Judge was in error, on the remand to him, in trying the issue of possession. It was an issue which, on the statements, clearly arose between the parties. The plaintiff had asked for a declaration of his title, and a confirmation of his possession. The defendant had denied the plaintiff's title, as well as his possession. There was then a distinct issue on the question of possession. The Judge, in the first instance, had dismissed the plaintiff's claim, on the ground that the suit had not been brought within six years of the date on which the hostile survey demarcation, which he sought to set aside, was made. This Court, on special appeal, held that the Law of Limitation did not apply to such suits, and remanded the case for trial on the merits, if the plaintiffs had made out a sufficient cause of action. The Judge therefore was, I think, right to try the remaining issues which, on the statements of the parties, required decision, and foremost among them was the question of possession. But it is said that that question had been already decided in another suit between the same parties in which the defendant had come into Court as plaintiff, asking for a measurement of the lands of the ryots living on the disputed land. The Judge took notice of this objection, and decided that in that case he had not determined that the present plaintiff was in possession. We have heard that decision read, and I am of opinion that the Judge was right in the view which he took of it, and that consequently he was right to go on and determine in this case whether the plaintiff was, as he alleged, in possession or not. In trying this question, the Judge rejected a number of zemindary papers put in by the plaintiff, on the ground that these were not produced in the course of a former suit in which the question of the plaintiff's possession had been raised. It appears to me, on reading the decision in that suit, that the point of possession was considered in it, and that it was important to plaintiff to have proved his possession if he had then possession. The plaintiff in that suit alleged that he had purchased and obtained possession of a certain share in an estate, and, as such purchaser, that he was entitled to certain moneys then deposited in the Collectorate. The defendant in that suit alleged that the plaintiff's

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purchase was not complete; that there had been a conditional sale to the plaintiff; and that, under certain circumstances, that sale would have become a complete sale, but the plaintiff had not conformed to the terms laid down between the parties, and the purchase had therefore not been completed, and the plaintiff had not obtained possession; and it followed that the plaintiff was not entitled to the money he claimed. In such a suit the plaintiff might have proved that the sale was complete, without adducing evidence to possession, and indeed the plaintiff might have recovered the money if the sale were complete, although he had not obtained possession. One ground upon which the decision went against the plaintiff was that he had not proved his possession. Of course possession would have been very strong evidence that the sale had been complete, and the absence of evidence upon the point was very properly remarked upon by the Judge who decided it. But it is a question whether the Judge in this suit is right in totally rejecting the whole of the documentary evidence now offered to possession, because it was not then produced. The decision in that case was that the sale to plaintiff was, as the defendant then alleged, not a complete sale; but there is no longer any question upon this point It is not now denied that the plaintiff's purchase is a complete purchase. It may, as the plaintiff's pleader suggests, have been since completed; and the zemindary papers now put in may have been made over subsequent to the decision of that suit. It may even be that the zemindary papers were even then in his possession, but he neglected to file them. The Judge is not, in my opinion, justified in rejecting the whole of these papers on no other grounds but that, if genuine, they would have been filed in the former suit. There may have been numerous reasons for their absence in the former suit. The plaintiff, or his zemindary agents, might have been examined on the point They might have explained the omission to file them, or it is possible that they could not have explained it; but the Judge was not right to reject the papers when the examination of the witnesses had not been turned on this point. The Judge is also clearly wrong in the view which he has taken of the evidence of two of the witnesses who do not depose to the defendant's possession, but in whose evidence there seems to have been a clerical mistake which has led the Judge into error.

However reluctant I may be to remand a case a second time to the Judge, still, if the Judge has drawn a conclusion from a former decision which is not justified by that decision, and has, upon that conclusion, wrongly rejected the whole of the plaintiff's documentary evidence as manufactured for the purposes of the present suit, I think that there is no other course to adopt. My learned colleague is of opinion that the Judge should not have tried the question of possession at all. Therein I have the misfortune to differ from him. I think he should have tried it, but that there has been error in law in the mode in which he has tried it. I would remand the case for retrial.

CASE 182 OF 1867.

26th March.

Regular Appeal from Dinagepore.

Lutchmeeput Singh Doogur and another, (Defendants) *Appellants, versus* Mookta Keshee Debee, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Mr. R. T. Allan and *Baboos Onoccool Chunder Mookerjee* and *Sreenath Dass* for Appellants.

Baboo Ashootosh Chatterjee for Respondent.

A sale made in execution of a decree passed by a Court of another district will be void, unless all the provisions of the law in regard to the conduct of such

The plaintiff, as trustee of the estate of Sreenath Sandial, a lunatic, sued to set aside two summary orders of the Judge of Dinagepore, dated respectively the 19th June and 28th December, 1866, and to obtain possession of a 5 annas 6 gundas 2 cowrees 2 krants share in certain properties specified in the schedule annexed to the plaint, which she alleges she purchased at an auction in satisfaction of a decree obtained by the lunatic against one Juddoonath Sandial. The sale, it is alleged, took place on the 4th September,

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sale be observed and carried out.

and was confirmed on the 4th December, 1865. The suit is valued at Rupees 56,366-4-12.

The defendants stated that the sale at which the plaintiff purchased was invalid, and vitiated by a defect in the procedure prior to sale; that the properties in dispute had been purchased by them on the 8th January, 1866, in satisfaction of a decree against the same judgment-debtor, *viz.*, Juddoonath Sandyal; that they had received a certificate under Section 259 of Act VIII of 1859, and been put in possession.

The Principal Sudder Ameen held that "the purchase of the defendants had become null and void, as the plaintiff, whose purchase is prior in date, had virtually become the owner of the property, and the judgment-debtor had lost all right and title in it."

With reference to the irregularity in the procedure prior to the sale at which the plaintiff purchased, the Principal Sudder Ameen held that the defendants were not entitled to raise any objections on that score, as they were not injured by such irregularities.

The suit of the plaintiff was decreed, the summary orders set aside, and possession awarded to the plaintiff in her capacity of trustee to the estate of the lunatic. The defendants to pay all costs.

The defendants appeal.

The plaintiff, respondent before us, purchased the properties in dispute in satisfaction of her own decree, or rather the decree obtained by the lunatic, her husband, for whom she is trustee. This decree was obtained in the Court of the Principal Sudder Ameen of Burdwan. It became necessary to execute this decree against the estate of the judgment-debtor, situated within the jurisdiction of the Dinagepore district. The procedure to be followed in such cases is laid down in Section 285 of Act VIII of 1859, and the Sections which immediately follow that Section.

It appears that the Principal Sudder Ameen of Burdwan, on the application of the plaintiff, decree-holder, addressed the Judge of Dinagepore, directing him to issue an order, under Section 235 of Act VIII of 1859, prohibiting the judgment-debtor from alienating his properties situated in the Dinagepore district. No application was made under the provisions of Section 285, and no certificate was forwarded to the Court by which the decree-holder, the plaintiff, wished the decree to be executed. The Judge of Dinagepore issued the prohibitory order under Section 235, and intimated to the Principal Sudder Ameen of Burdwan that he had done so. Subsequently, and without further procedure under Section 285 and the Sections following it, and without further attachment, the properties in dispute were put up for sale, and purchased by the plaintiff. A certificate, however, under the provisions of Section 259, was not granted to the plaintiff, and therefore there has been no valid transfer of the right, title, and interest of the defendant in the property sold. (*Vide* the latter portion of Section 259.) Possession also was not given to the plaintiff. Subsequently the defendants, who had obtained a decree in the Moorshedabad Court against the same judgment-debtor, *viz.*, Juddoonath Sandial, applied in the manner laid down by the Code under Section 285, obtained the attachment and sale of the properties in dispute, became the purchasers thereof, and, on obtaining the certificate of their title, were duly put in possession.

The question before us is this. Which sale is to prevail?

We are of opinion that the sale under which the plaintiff purchased is invalid, and that the purchase by the defendants must prevail.

The provisions of Section 285 were not carried out. The plaintiff, who had obtained a decree in the Burdwan Court, which could not be executed within the jurisdiction of that Court, whose duty it was to execute the same, made no application to that Court in the manner laid down in Section 285. No copy of the decree or certificate that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Burdwan Court, was forwarded to the Dinagepore Court, within whose jurisdiction the properties against which the plaintiff desired execution are situated.

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The Dinagepore Court, instead of proceeding according to the rules laid down for execution of decrees referred by another Court, proceeded to sell without further attachment, and without conforming to the procedure laid down in Section 285 and the following Sections. Such a sale is clearly illegal. This view is supported by a decision published in Wyman's Reporter, Vol. IV, 170, in a case which is on all fours with the present case. The plaintiff is not in the position of a stranger who purchases without any responsibility for the regularity of the proceedings prior to the sale, and as such is entitled to consideration, for she is the representative of the decree-holder, and it was incumbent upon her to observe all the formalities required by the law. It is a somewhat curious coincidence that in a case in which this plaintiff was the decree-holder, published at Volume VII, Weekly Reporter, page 267, she was distinctly informed by this Court how an attachment of property, situated in another district than that in which the decree is passed, must be made. The Principal Sudder Ameen seems to consider that the defendants have not been injured by the irregularities, and therefore they are not entitled to object. The Section apparently relied upon by the Principal Sudder Ameen, although he does not quote it, is Section 256. That Section refers to objections by judgment-debtors who must prove to the satisfaction of the Court that they have sustained substantial injury by reason of such irregularity before a sale can be set aside. The defendants are third parties who have purchased at a sale regularly conducted, and after all the formalities prescribed by the law had been observed by them. Section 256 does not apply to their case. It is idle to say that they would not be injured if their purchase is set aside, as such purchase represents a portion of the money due to them under their decree, and which the judgment-debtor may have no other means of satisfying. The plaintiff is also unable to produce her title-deed, the certificate of sale, under which alone the right, title, and interest in the property purchased passes.

We reverse the decision of the Principal Sudder Ameen, and decree this appeal, the result being that the plaintiff's suit is dismissed with costs of both Courts, bearing interest.

CASE 627 OF 1867.

26th March.

Miscellaneous Appeal from Backergunge.

Ramdhun Roy and others, (Judgment-debtors) *Appellants, versus* Khajah Abdool Gunee and others, (Decree-holders) *Respondents.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboos Romesh Chunder Mitter and *Sreenath Dass* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

An application to execute a decree must contain particulars of the suit in which it was given, the parties, the nature of the decree, property sought to be attached, &c., if it is to be regarded as a *bonâ fide* application, such as would extend the period of limitation in execution.

We are of opinion that this case clearly falls within the principle adopted in the recent Full Bench Ruling of this Court, which is not, we believe, yet reported, and that the execution of this decree having been absolutely barred on the 6th April, 1865, no subsequent proceedings, whether permitted by inadvertence of the Court, or by the silence of the judgment-debtor, can revive that which had been absolutely extinct. The last effective proceeding, taken before the application in April, 1865, was the sale which took place at the instance of the creditor in January, 1862, (it was the sale of property belonging to other judgment-debtors), and which was confirmed in March, 1862. Intermediately between those proceedings, 1862 and April 1865, a petition, on the part of the decree-holder, was lodged in the Judge's Court on the 30th December, 1864. That petition set forth that the decree-holder had allowed the execution proceedings to be struck off the file, but that it was now requisite for him to take some measures to realize the amount due to him, and he therefore prayed that his case "might be restored to the file." It seems that, upon the recommendation of a mohurrir of the Judge's office, the case

was "restored to the file," and an order was made that notice should be served on the debtor. But the decree-holder took no further step whatever, either in pursuance of that order, or otherwise, and the petition in question was therefore, with the proceedings, again struck off the file. Now, if that petition had been an application within the meaning of the Procedure Code, for execution of a decree, the question might have arisen whether it was a *bonâ fide* application, and as such, a proceeding to keep the decree in force which would prevent the bar of limitation from taking place.

But it seems to us quite clear that this petition could not be so designated. Section 207 of the Code of Civil Procedure provides that "when any person in whose favor a decree has been given, is desirous of enforcing the same, he shall apply to the Court, whose duty it is to execute the decree, either in person or through his pleader in the suit, or some other pleader duly appointed to act for him on that behalf; and then Section 212 provides "that the application for execution of a decree shall be in writing, and shall contain, in a tabular form, the following particulars, *viz.*, the number of the suit, the names of the parties, the date of the decree, whether any appeal has been preferred from the decree, and whether and what adjustment of the matter in dispute has been made between the parties subsequently to the decree, the amount of the debt or damage due upon it, or other relief granted by the decree, the amount of costs, if any were awarded, the name of the person against whom the enforcement of the decree is sought, and the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or otherwise, as the case may be."

Now this last portion of the Section is a very material one, because the requisition made upon the Court for its assistance by way of delivery of property or arrest of person named, or attachment of property, would be an excellent indication of the real intention of the decree-holder to enforce his decree; and although the Court might not be inclined to look rigidly at the application, to see whether it contained the whole of the particulars set forth in that Section, it would undoubtedly require to be shown that the application did contain some essential particulars, and, above all, that it required the assistance of the Court to carry out and enforce the decree by means there specified. But the petition to which reference is made in this case contained not one single particular of those set forth in the Section cited.

It merely states:—"My execution case has been struck off. I ask the Court to replace it." This was filed apparently with some vague intention of subsequently moving the Court to make a further order. But whatever the intention of the party may have been, he carried it no further, and no application to execute the decree was made at that time. It seems therefore to us quite clear that no proceeding had taken place within three years next before April in 1865, in respect to which question could arise whether or not that proceeding was *bonâ fide*.

We think therefore the execution was, and is, barred, and the decree-holder cannot proceed. The appeal must be allowed, and the decision of the Court below reversed with costs.

Miscellaneous Appeal from the 24-Pergunnahs.

CASE 504 OF 1867.

Hameeda Bibee and others, *Appellants*, *versus* Noor Bibee, *Respondent.*

27th March.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboo Anund Gopal Palit for Appellants.
Baboo Poorno Chunder Shome for Respondent.

This is a petition by Hameeda Bibee and others, complaining of the grant of a certificate by the Zillah Judge of the 24-Pergunnahs to Noor Bibee in respect of the estate of Faizoollah, deceased. It appears that Noor Bibee,

A Zillah Court can either by way of review, or of its inherent authority,

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cancel its order for grant of certificate of administration, if satisfied that it was obtained by fraud and misrepresentation.

describing herself as a resident of the 24-Pergunnahs, and as the widow of this Faizoollah, applied to the Judge of that district for a certificate under Act XXVII of 1860, and the Judge, I presume after taking the various steps prescribed by that Act, granted Noor Bibee the certificate in August, 1867. Very shortly after the granting of the certificate, the present petition came before the Judge, and represented to him that the said certificate had been obtained from his Court by fraud, inasmuch as neither was the deceased Faizoollah, a person whose ordinary place of abode was within the 24-Pergunnahs, nor was Noor Bibee, as she alleged herself to be, the wife of Faizoollah, and upon this allegation they prayed the Zillah Judge to enquire into the matter, and to recall the certificate granted to Noor Bibee. The Judge in his decision, dated the 6th September last, held that it was not competent to him to entertain the applications, inasmuch as the Act, *viz.*, Act XXVII of 1860, does not authorize the Zillah Court to cancel a certificate once given. The Judge observed that the applicant must either institute a suit to set aside the certificate, or he must obtain from the High Court an order which would authorize his Court to re-open the matter; and he accordingly rejected the application. It is not quite clear what order the Judge meant that the petitioner should obtain from the Court which would authorize him, the Zillah Judge, to re open the matter. I do not find in Section 6 (which states under what circumstances the Sudder Court may interfere with orders made by the District Court) any provision which precisely meets the present case. The petition now before us is not brought forward by way of appeal against the Zillah Judge's order, so much as by way of application with a view to this Court granting a fresh certificate, or otherwise interfering in the matter. We know at present nothing of the merits of this case; the matter has not gone beyond a mere allegation on the part of the petitioner. It is manifest, however, that if that allegation be true, and if the deceased Faizoollah had a fixed place of residence within the town of Calcutta, and not within the 24-Pergunnahs, that the Zillah Court of the 24-Pergunnahs would have no jurisdiction to grant a certificate in respect of his estate; but neither would this Court itself possess any such jurisdiction. It seems to me, however, that the Zillah Judge has taken too contracted a view of his own powers in respect of the application made to him. It seems to me a power inherent in all Courts of Justice, on finding that an order has been obtained from the Court by fraud and misrepresentation, and that the true facts are such that, if they had been known to the Court, the Court would not have acted in the matter, for the Court, on being satisfied of such fraud, to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged.

It is true that Act XXVII of 1860 makes no provision for the withdrawal of a certificate granted by the Civil Judge; but if it were necessary to bring this matter within the written provisions for procedure of Courts in this country, it seems probable that the Zillah Judge, on the complaint of a person aggrieved by his order in granting this certificate, might review the order which he had made, and thereupon might recall the certificate. But whether the Zillah Judge might have acted under the rules relating to review, or under the general power that I have spoken of, I entertain no doubt that he might so deal with his first order, and ought to do it on being satisfied of the fraud which had been practised.

I think therefore the Zillah Judge, on receiving the petition of Hameeda Bibee and others, ought to have immediately called upon the petitioners to substantiate their allegations by affidavit or other proof; he should thereupon have summoned the holder of the certificate, and, after due enquiry into the circumstances, have passed such orders as the case might seem to demand.

I do not know that, under the circumstances stated, we can make an order which shall be binding upon the Zillah Judge, requiring him to act as I have stated. But I am quite satisfied that, after the expression of our opinion to this effect, the zillah Judge will not hesitate to do that which, in our opinion, he ought to do, and to consider the circumstances. If, contrary to

our expectations, the Judge should again refuse to act, the petitioner, if so advised, may make a further application to this Court.

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CASE 1348 OF 1867.

30th March.

Special Appeal from Backergunge.

Golam Ali Chowdhry and others, (Plaintiffs) *Appellants, versus* Baboo Gopal Lall Tagore and others, (Defendants) *Respondents.*

Before *Phear* and *E. Jackson*, J. J.

Baboos Onoocool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.
Mr. R. T. Allan and *Baboo Kally Mohun Dass* for Respondents.

Where a chur forms in a navigable river in front of several estates, and the channel between it and these estates becomes fordable opposite some one or more of them, the owners of those the most contiguous estates become entitled to the whole chur. The subsequent drying of the channel between it and the other estates gives the owners of these latter no claim.

It is admitted that the chur, a share of which the plaintiffs seek to obtain by bringing this suit, first made its appearance as an island surrounded by unfordable water in a large navigable river, and was at that time, by law, at the disposal of Government. Afterwards the channel between it and the shore of the river became fordable at a certain part. The Government did not assert its right previously to the occurrence of this event, and consequently thereto it declined to do so. Under these circumstances, as soon as the channel became fordable, according to Regulation XI of 1825, Section 4, Clause 3, the chur became an accession to the land of the person or persons whose estate or estates on the bank of the river fell under the description of being "most contiguous" to it. We think this somewhat vague phrase is intended to comprise only the estate or estates with which the chur comes into contact, so to speak, along the length of the fordable part of the channel. It does not embrace estates which may be on the river bank opposite some portion of the chur, but with an unfordable channel lying immediately between them and the chur. The Regulation is silent as to how the chur is to be partitioned between the estates, in the event of its being an accession to more than one at once; but no difficulty on this account arises here, because the Lower Appellate Court has found as a fact that when the annexation to the river bank took place, the fordability of the channel did not extend beyond the defendant's frontage. Consequently, with the interpretation just given to the Regulation, the whole chur then became an accession to the defendant's land, and part of his tenure. If this be so, no portion of it would afterwards cease to belong to him, merely by reason of the deep water between it and, say, the plaintiff's estate becoming shallow and fordable. The sitting up of the channel could not have the effect of transferring the ownership from the one person to the other. Again, after the chur had, by the first occurrence of the fordable channel, become part of the defendant's property, all further accretions to it, if gained by "gradual accession," would also belong to him, even though the result would, in the aggregate, be a prolongation of the chur in front of estates on the river bank not belonging to the defendant. The Lower Appellate Court appears to us to have determined the case in conformity with these principles, and the special appellant has failed to satisfy us that there is any ground for impeaching the decision in this Court. We therefore dismiss this appeal with costs.

CASE 341 OF 1867.

31st March.

Regular Appeal from Rungpore.

Tarramohun Bhuttacharjee, (Plaintiff) *Appellant, versus* Kripa Moyee Dabea, (Defendant) *Respondent.*

Before *Loch* and *Hobhouse*, J J.

Baboo Nilmonee Sein for Appellant.
Baboos Sreenath Dass and *Romesh Chunder Mitter* for Respondent.

An adopted son succeeds, not only lineally, but collater-

The suit was brought to have plaintiff declared the reversioner to the property left by Radhanath Bhuttacharjee, by setting aside the adoption of

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ally, to the property of his relations in the adoptive family.

When an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father, he takes an equal share. If there be sons subsequently begotten of the adoptive father, the adopted son takes a less than equal share.

one Woomanath made by the defendant Kripa Moyee, his widow, without permission, and to declare plaintiff to be the sole heir of Ramanath Chuckerbutty, his widow Chundramonee Dabea having deceased.

The lower Court held that the adoption was valid, the defendant Kripa Moyee having full permission to adopt, and that all the objections to the mode of adoption, and to the character of the natural father of the child adopted by Kripa Moyee, were refuted by the evidence. The Principal Sudder Ameen therefore dismissed this part of the plaintiff's claim. With regard to his claim to be considered sole heir to the deceased Romanath Chuckerbutty, the Principal Sudder Ameen found that the plaintiff and the adopted son were both in the same degree of relationship to the deceased, and as such both were entitled to share; but as Woomanath was an adopted son, the Principal Sudder Ameen, referring to a case reported in II Macnaghten's Hindoo Law, page 69, held that plaintiff was entitled to two-thirds, and Woomanath only to one-third of the property.

An appeal has been preferred by the plaintiff against the whole decision, but, on the case coming up for hearing, the appellant's pleader gave up so much of the claim as asked the Court to declare him to be the reversioner to the property of Radhanath Bhuttacharjee, but prayed the Court to try his right to the whole estate of Romanath Chuckerbutty, by setting aside the adoption of Woomanath; and he urges that even if the adoption of Woomanath be found valid, plaintiff is, nevertheless, entitled to the whole estate.

A cross-appeal is taken by the respondent under Section 348, to the effect that the adopted son is entitled to take a moiety of the estate of the deceased Romanath Chuckerbutty, and not a third, as supposed by the Principal Sudder Ameen.

The pleader for the appellant, after ascertaining the opinion of the Court in regard to the terms of the deed of permission, dated 18th Aghran, 1259, which he read out, withdrew his objection as to the fact of the adoption, and of the defendant's right to adopt.

He then urged that, as laid down in the Dyabhaga, an adopted son, though entitled to succeed as heir to the property of his adoptive father, cannot succeed to the property of his adoptive father's relatives; he can succeed lineally, but not collaterally; and in support of his allegation the pleader read a passage from Devala, quoted in Section 7, Chapter X of the Dyabhaga, and the author's comment in Section 8, to the effect that the true legitimate son and the rest to the number of six are not only heirs of their father, but also heirs of kinsmen, that is, of sapindas and other relations; the others are successors of their (adoptive) father, but not heirs of collateral relations (sapindas); and then as to the share of the adopted son, the pleader quoted Section 9 from the same book:—"They take the whole estate of a father who has no legitimate issue by himself begotten, but if there be a true son, such of them as are of the same tribe as the father take a third part."

With regard to the question of the right of an adopted son to succeed collaterally, as well as lineally, we think it sufficient to quote the Privy Council Decision in the case of Shumboo Chunder Chowdhry, dated 6th February, 1835, reported at page 25, Sutherland's Privy Council Judgments, which ruled that, according to the authorities on Hindoo Law, and the weight due to them, an adopted son succeeds, not only lineally, but collaterally, to the inheritance of his relations.

We have now to determine whether Woomanath, being an adopted son, would take only a third, or is entitled to share equally with plaintiff in the property left by Romanath Chuckerbutty. There is no contention that if, after a son be adopted, a son be born of the body, the latter is entitled to the larger portion of the inheritance, whether two-thirds or three-fourths, and the former only to the remainder. There can also, we believe, be no doubt that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, when there is no such son subsequently born. The decisions of the late Sudder Court quoted in the margin, and the following passage from the

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1 Volume, Select Reports, page 206.
VI Volume, Select Reports, page 203.
Sudder Decisions for 1858, page 1863.

Vyavashta Durpana, page 887 of 2nd Edition, verse 584, supported by authorities, prove that such is the case:—"An absolute dattaka properly adopted ceasing to belong to the Gotra of his natural father, becomes a member of the family of his adopter, and represents his legitimately begotten son, and the duties and the rights of the legitimately begotten (ourasa) son devolve upon him." A case is quoted to us from II Macnaghten, page 69, f. f. Looking at the answer given, we have some doubt whether there was not some confusion in the pundit's mind as to the position of the adopted son in that case; but whether this be so or not, that case is not applicable to the present. It appears to us that the position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father; that when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share which his father would have obtained. In the present case plaintiff and defendant are in equal relationship to Romanath Chuckerbutty; their respective grandfathers were his first cousins, and their respective fathers were his first cousins once removed; so that if the property had been inherited either by their grandfathers or by their fathers, the shares of each would have been equal; and such being the case, there is no reason why the plaintiff and defendant should not each take the share to which their respective fathers were entitled. A passage from the Duttaka Chundrika, Section V, paragraph 25, has been quoted to us to prove that the adopted son of a brother does not receive the same share as his uncle, but all that the passage appears to rule is that the adopted son of one adopted succeeds only to his adoptive father's estate. In the present case we find that the adoptive father would have been entitled to a moiety of the property left by Romanath Chuckerbutty, and his son is, we think, entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body, does not, in our opinion, hold good in the case, for the claimants do not derive their title from the same father. We dismiss the plaintiff's appeal with costs, and correct the Principal Sudder Ameen's judgment in regard to the defendant, and assign to Woomanath a moiety of the property left by Romanath Chuckerbutty. The defendant, cross-appellant, will obtain her costs.

Special Appeal from Patna.

CASE 2415 OF 1867.

3rd April.

Ramyad Shahoo (Plaintiff) *Appellant, versus* Doolar Shahoo, (Defendant) *Respondent.*

Before *Macpherson* and *E. Jackson*, J. J.

Baboo Kishen Succa Mookerjee for Appellant.
Baboo Tarrucknath Sein for Respondent.

When an arbitration award is not contested, it need not be brought into Court for execution, and the fact of its not having been so brought into Court will not prevent effect being given to it by the Courts in subsequent suits.

This was a suit to recover certain lands. The plaintiff put forward, as his title-deeds to those lands, a bill of sale in the name of Bijnath Shahoo, and an arbitration award made between plaintiff and Doolar Shahoo. Plaintiff alleged that the lands had been purchased jointly by himself and Doolar Shahoo in the name of Bijnath Shahoo, the minor son of Doolar Shahoo, and that in a separation of estates between himself and Doolar Shahoo, which had been carried out by arbitrators, these lands had fallen to his share. Doolar Shahoo did not contest the claim, but Byjnath Shahoo, being of age, alleged that the purchase by his father had been made for his, Bijnath Shahoo's benefit, and with money belonging to him, Bijnath Shahoo.

The first Court decreed the plaintiff's claim. The Appellate Court, however, was of opinion that the arbitration award was rendered null and void by the plaintiff not having brought it into Court to be enforced within six months of its being passed, and quoted Section 327, Act VIII of 1859, in support of

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this view of the law. On this ground the Appellate Court dismissed the plaintiff's suit.

On special appeal it is urged that the Appellate Court has taken an erroneous view of the law. We think that it is erroneous. Section 327 enacts that if an arbitration award is brought into Court within six months, it may, if no objection is raised to it, be enforced as a decree, and execution taken out upon it. But it does not follow that all arbitration awards, not so brought in, are invalid. As Doolar Shahoo has not contested the plaintiff's claim under the award, that award is good as between the plaintiff and Doolar Shahoo. As between the plaintiff and Bijnath Shahoo, the issue was properly raised in the first Court, whether the lands were purchased by Doolar Shahoo for himself and the plaintiff jointly with their funds, or whether they were purchased by Doolar Shahoo for Bijnath Shahoo with Bijnath Shahoo's funds. The Principal Sudder Ameen must proceed to try the same issue. This decision is reversed, and the case remanded to him.

CASE 2432 OF 1867.

8th April.

Special Appeal from Patna.

Beharee Ram, (Defendant) *Appellant, versus* Mussamut Shoovuddra, (Plaintiff) *Respondent.*

Before *Macpherson* and *Glover*, J. J.

Baboo Doorgadoss Dutt for Appellant.
Baboo Grish Chunder Ghose for Respondent.

To support a claim of pre-emption on ground of vicinage, plaintiff must be *owner* of the neighbouring property to that claimed, not merely in possession of it.

Glover, J.—This was a suit to cancel a deed of sale of the 29th April, 1866, and to recover possession from the defendant of a thatched house and courtyard or compound, on the ground of right of pre-emption as a "neighbour."

The defence was that the plaintiff had no land contiguous to the plot claimed by her, and was therefore not a "neighbour." The defendant, who was in possession by purchase from the owner, one Seeta Ram, further alleged that the disputed house and courtyard abutted on to his property, and that he, and not the plaintiff, had the right of pre-emption,—a right which he had duly exercised.

The Moonsiff, not being satisfied with the evidence of vicinage, held a local investigation, and found that the house and land, on account of which the plaintiff claimed the "huk-shuffa" in the disputed plot, did not belong to her, but to her nephew, the minor son of Mottee; and that as she did not sue on behalf of the son, she had no ground of action, her own property not being contiguous to that claimed, but at some distance from it. He found, moreover, that she had not performed the necessary ceremonies ("tulub-i-monsibat.")

The Principal Sudder Ameen reversed this decision, on the ground that the defendant's statement as to the ownership of the contiguous land had been proved to be false, and also because, in his opinion, a Civil Court decision, (No. 206) to which both plaintiff and defendant were parties, showed that the plaintiff was then in possession of the contiguous land, and had therefore the right of pre emption over the land now in suit. He found also that the necessary ceremonies had been performed.

It appears to me that this decision is wrong on the face of it. The plaintiff claiming as "shuffee," by reason of neighbourhood, was bound to prove her case, and to show that the contiguous land belonged to her. So far as her claim went, it was absolutely immaterial that the defendant pleaded that the land was part of a Government road, for any amount of mis-statement in this particular would not help to prove what the plaintiff was bound to prove, namely, that she owned the contiguous land, and the Principal Sudder Ameen was clearly wrong in allowing this to influence his decision.

Then as to the Civil Court decision. There is nothing on the record to show that the land is identical, but it is said that, during the trial of the present suit, the defendant's pleader admitted that the land then in question was the same as that on the ownership of which the plaintiff now claims as "shuffee;"

but even if this be admitted, it does not advance the plaintiff's case in the least. That was a suit for permission to demolish a wall, and the plaintiff in this case was allowed so to demolish it. The Principal Sudder Ameen takes this as proof of the plaintiff's possession, and holds that being in possession of the contiguous land, she is entitled to the right of pre-emption which she seeks.

But mere possession gives no "huk-shuffa," according to Mahomedan law. There must be ownership ("milik") in the contiguous land (*vide* Bayley's Mahomedan Law, page 473), and it has been found as a fact that this land does not belong to the plaintiff, but was originally the property of Mottee, her brother, and that Mottee has left a minor son now under his aunt's care.

These facts are nowhere denied, and therefore, although the plaintiff may be in possession of the contiguous land, it is clear that she is not the owner of it, the title being with her nephew. The plaintiff does not sue as guardian of the minor, but in her own right, and therefore, as it seems to me, has, on the admitted facts of the case, no *locus standi* whatever.

The Principal Sudder Ameen has considered that possession and ownership of contiguous land give similar rights of "shuffa;" but this is a clear error of law. There is no doubt that the contiguous land belonged to Mottee, and that his son is the proper person to claim the right of pre-emption. The plaintiff has no case.

I would reverse the decision of the Principal Sudder Ameen, and restore that of the first Court with all costs on the special respondent.

Macpherson, J.—I concur.

Miscellaneous Appeal from Purneah.

CASE 8 OF 1868.

8th April.

Syud Fedeh Hossein, (Objector) *Appellant*, *versus* Mussamut, Khajoorun-nissa, (Opposite Party) *Respondent*.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Messrs R. V. Doyne and *C. Gregory* for Appellant.
The Advocate General and *Moonshee Ameer Ally* for Respondent.

A certificate of administration must not specify the property to which the estate to be administered to is composed. Any party injured by such specification may appeal to High Court, and will, if successful, get his costs.

We have had no doubt as to the order which we ought to make in respect of the certificate granted in this case. In point of fact, the learned Counsel on both sides agreed from the first that the certificate could not be sustained. The only question upon which any doubt existed in our minds is as to costs.

The petitioner, Ranee Khajoorun-nissa, applied to the Judge, reciting that her husband Rajah Enaet Hossein had recently died, leaving a minor son, named Syud Ata Hossein, to whom he had, by a will made some time before his death, bequeathed the whole of his landed and other property. She then alleged that, under this will, she, as guardian of the minor, was in possession of the whole of this property, specifying the Pergunnah Soorjapore and the appurtenances thereof. She then represented to the Court that, for the efficient management of the zemindary, and for the purpose of conducting suits on behalf of this minor son as the representative and successor of the deceased Rajah, it was necessary for her to take out a certificate, and she therefore prayed the Court to grant her a certificate under the provisions of Act XL of 1858.

Now it is quite true that she does not, in the petition, expressly ask the Court to grant her a certificate to manage the Purgunnah Soorjapore; but it seems to me quite clear that the language of her petition was so worded as to solicit, and to lead the Court to grant her a certificate of that tenor, and that, precisely in accordance with that petition, the Judge did, in fact, grant her a certificate in which the Pergunnah was specified, and the minor was described as the proprietor of the same estate.

We have no doubt that the appellant before us was entitled to appear in the Zillah Court and to object to the grant of a certificate of the nature

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which the petitioner obviously desired, and that when the Court granted such a certificate, its terms being manifestly of a kind likely to be prejudicial to him, that he was further justified in coming in appeal to this Court.

The certificate, it appears to us, must be cut down, so as to be in precise conformity with the terms of Act XL of 1858, Section 3; that is to say, it must be a certificate enabling the petitioner, Ranee Khajoorun Nissa, to administer the property of her minor son, Syud Ata Hossein. As the Ranee is the mother and natural guardian of this minor, it becomes necessary to appoint her to be guardian under the terms of the will, and the certificate must contain no specification whatever of the extent or nature of the property to which the minor is entitled. Under the circumstances we have above stated, it appears to us that the appellant, having succeeded in obtaining this material amendment of the certificate, is entitled to his costs, both in this Court and in the Court below

We think also it should be added that this portion of the Judge's decision, which speaks of the appellant under the name of Meer Bubroo as an impostor put forward by Syud Ahmed Reza, should be declared to be extra-judicial, and to have no effect upon the rights or claims of the appellant.

The Judge, we observe, has not pronounced in favor of the will, or against it, but the expressions we have just read are such as might undoubtedly be prejudicial to the appellant in future litigation.

The same order will apply to the appeal No. 27 in which Mr. Gregory appears on behalf of a distinct objector.

CASE 734 OF 1867.

9th April.

Miscellaneous Appeal from Hooghly.

Bidhoo Bibee, (Decree-holder) *Appellant, versus* Lalla Keshub Chunder Baboo and others, (Judgment-debtors) *Respondents.*

Before *L. S. Jackson* and *Hobhouse*, J. J.

Baboos Mohendro Loll Mitter and *Obhoy Churn Bose* for Appellant.
Baboo Bama Churn Banerjee for Respondent.

A payment by a judgment-debtor to an Officer of the Court arresting him under a warrant is such an adjustment of the decree as the Court must recognize.

In this case the appeal must be dismissed with costs. The appellant had a decree against Lalla Keshub Loll. In execution of that decree, process of arrest was issued, and the warrant is before us. It distinctly directs the Officer of the Court to arrest and proceed against the debtor according to law, unless he forthwith pays him the amount of the debt, 160 Rupees 13 annas and 5 pie, together with costs of execution.

The Judge has found, upon the evidence, as matter of fact, that, in execution of this warrant, the Officer of the Court did take the defendant, and that the defendant thereupon paid him the money, which money was paid over to the execution-creditor.

It is contended that this is not a payment which ought to be recognized by the Court, inasmuch as it is an adjustment of a decree which has not been made through the Court, or certified to the Court by the person in whose favor the decree is made

It seems to us, however, quite clear that this latter Clause of Section 206 does not relate to payments made under pressure of the process of the Court, but relates to voluntary adjustments of a decree made between the parties to a suit. If parties paying money to the Officer of the Court under authority of the Court's process, and under pressure of that process, are not to be protected, it appears to us that no judgment-debtor would be safe. The Judge having found, as a fact, that this appellant has received his money, we think he is not in a position to ask for "remedies," or object to the payment as not being made through the Court.

Regular Appeal from the 24-Pergunnahs.

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CASE 307 OF 1864.

Brojokishoree Dassee, guardian of Radhanath Bose, her adopted son (one of the Defendants), *Appellant, versus* Sreenath Bose, for himself and as guardian of his minor sons, Juddoonath Bose and others, (Plaintiff) and others, (Defendants) *Respondents.*

Before *Peacock*, C. J., and *Hobhouse*, J.

Mr. Montriou and *Baboos Ashootosh Dhur* and *Mohendro Loll Shome* for Appellant.

Mr. R. V. Doyne and *Baboos Chunder Madhub Ghose* and *Nilmoney Sein* for Respondents.

A declaratory decree will not be given at the instance of a stranger, even though he sue with the consent of the true reversionary heirs.

Analysis of the position of the parties to this case.

This suit was brought by Sreenath Bose, son of Boiddonath Bose, on his own behalf, and as guardian of his minor sons, against Brojokishoree Dassee, the widow of Muthooranath Bose, as guardian of her alleged minor son Radhanath Bose, also against the widow of Gobind Purshad Bose and the widow of Rajkristo Bose.

The plaint sets out that the deceased Muthooranath Bose was a cousin of the plaintiff, being the son of his father's elder brother, Ramdhun; that Muthooranath's widow, Brojokishoree, after the death of Muthooranath, namely, in the year 1260, adopted a son, although her husband had left her no permission to do so; that, under color of that adoption, she had applied for a certificate under Act XX of 1841 to the estate of Golucknath, her husband's brother; that the Judge trying the case summarily had granted the certificate, and that that judgment had been upheld on appeal to the late Sudder Court. The suit was brought to set aside the said certificate, to declare the adoption invalid, and to declare that in the absence, meaning upon the death of the female defendants, the plaintiff and her sons successively would be the heirs of the husbands of the female defendants and of Golucknath Bose, deceased.

The suit commenced on the 31st December, 1861, and the judgment of the late Sudder Court, affirming the grant of the certificate, was given in December, 1858, nearly three years before the commencement of this suit.

The plaintiff was son of Boiddonath, one of the four sons of Nund Coomar Bose. Ramdhun was the eldest of those four sons. Gobind Purshad, whose widow is one of the defendants, was the second son and a brother of Ramdhun. Boiddonath, the father of the plaintiff, was the third son, and Rajkishoree, whose widow is also a defendant, was the fourth son. Ramdhun, the eldest of the four brothers, had two sons, Golucknath and Muthooranath, and a daughter, Phoolkishoree. Golucknath died, without issue, on the 12th of April, 1842, leaving a widow, Unnopoorna Dassee, who died on the 1st March, 1857. Muthooranath, the alleged adoption by whose widow is the matter in dispute, died in 1833. The daughter, Phoolkishoree, had two sons, Soorjocoomar Roy and Jadub Coomar Roy. Radhanath is alleged to have been adopted in 1853.

It is clear that, under the circumstances above stated, Soorjocoomar Roy and Jadubcoomar Roy were the heirs of Golucknath, and the presumptive reversionary heirs of Muthooranath if the adoption of Radanath was invalid, they being the sons of a sister, and the plaintiff being merely a cousin.

If the adoption of Radhanath was valid, he was not the reversionary heir of Gobind Purshad, nor of Rajkishen, inasmuch as he was one degree further removed than the plaintiff, the plaintiff being a nephew, and Radhanath being the son of a nephew.

In default of brothers, brother's sons succeed. They take according to numbers, and not by representation, as grandsons and brother's sons are totally excluded by the existence of brothers.

As regards, therefore, the widow of Gobind Purshad and the widow of Rajkishen, there was no necessity to make them parties to this suit, inasmuch as Sreenath would not have to get rid of the adoption of Radanath, who, if validly

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adopted, was merely a nephew's son, in order to establish his own reversionary heirship as nephew. Therefore, as far as the estate of Gobind Purshad and Rajkishen are concerned, there is no necessity for a declaratory decree as regards the validity or invalidity of the adoption.

I understand that the plaintiff has withdrawn, or that he gave up now that part of his prayer which asks for a declaration that, upon the death of the female defendants, he and his sons successively will be the heirs of the husbands of the female defendants. But even if he did not give it up, he would not be entitled to have any such declaration, inasmuch as he would not be the heir of their husbands unless he should survive them; and it was a matter of contingency whether he would survive them or not.

The question therefore is reduced simply to whether the adoption is invalid, and whether the plaintiff is the heir of Golucknath.

He cannot be entitled to a declaration that he is the heir of Golucknath, inasmuch as he is not such heir, even if the adoption be invalid. Whatever may be the effect of the consent of Soorjocoomar Roy and Jadubcoomar Roy, it cannot have the effect of making the plaintiff the heir of Golucknath.

The only question which remains to be decided is whether the Court should declare the said adoption invalid. To this extent the suit does not ask for relief, but merely asks for a declaratory order.

It has been decided in several cases, in England, that, under the 15 and 16 Vic., Chapter 86, which contains words similar to those of the 15th Section of Act VIII of 1859, it is in the discretion of the Courts in what cases a declaratory decree ought to be made. By "discretion" we do not mean "caprice," but a discretion to be exercised according to sound principles. The cases were particularly referred to by me in the case No. 424 of 1866, IV Wyman's Reporter, page 60, Civil Rulings.

One of the principles upon which the Courts are guided is that a declaration will not be made at the instance of a stranger, who has no right to come to and interfere with the affairs of other men. That was decided in Hossein *vs.* Dino Bundhoo Sein by Mr. Justice Phear in Bourke's Reports, page 8; and it appears to us to be a sound principle. For instance, in a case of this sort, a stranger, who has no interest in the matter, has no right to commence a suit and to ask a Court for a declaratory decree that the adoption of a particular individual is invalid. It might be very reasonable, at the instance of a presumptive reversionary heir, whose estate would not accrue until the death of the widow, to try whether an adoption made by a widow was valid or not, and upon proof of the invalidity of the adoption, to declare that it was invalid. In such a case, if the reversionary heirs should be compelled to wait until the death of the widow before they could get the question tried as to the validity of the adoption, they might have to wait until after all the witnesses who could prove the invalidity of it were dead, for the widow might outlive the witnesses. Such a suit might, we apprehend, be maintained by the presumptive reversionary heirs for the benefit of the persons, whether themselves or others, who might be the heirs of the husband at the time of the widow's death, in the same manner as the presumptive reversionary heirs may sue to restrain a widow from committing waste, although, if the widow should survive them, they would sustain no injury by the waste. It is unneccesary for the Court now to determine whether, if, in such a case, the defendant should succeed in establishing the validity of the adoption, the decree would not be binding upon the persons who might eventually succeed upon the death of the widow, in the same manner as a decree against the widow respecting the rights of her husband in an estate is binding upon the reversionary heirs. It has been decided by the Privy Council that such a case is binding upon the reversionary heirs in Ranee Surnomoyee's case reported in II Weekly Reporter. This of course is upon the assumption that the suit is honestly brought and conducted.

A decree establishing the adoption in a suit brought by a stranger would not be binding upon the reversionary heirs; it would be binding only upon the stranger and persons claiming through him, or persons such as Soorjo-

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coomar Roy and Jadubcoomar Roy, who, in the present case, had given their consent to his carrying on the suit.

It is very necessary that the Court should be careful in making declaratory decrees as to rights. They ought not, as a general rule, to be made in cases which are wholly one-sided, and in which the decree would not be binding upon the parties really interested, if the defendant should succeeded in establishing his right.

Now, in this case, Sreenath, the plaintiff, as regards the estates of Golucknath and Muthoornath, irrespective of the deed of compromise, which was the subject of the third voice case, was a mere stranger when he commenced the suit. It has been shown that he was not the heir either of Golucknath or of Muthoornath; and if the case had remained in the same state as that in which it had been when the suit was commenced, I, for my part, should have had no difficulty in deciding that he was not entitled to a declaratory decree with reference to the validity or invalidity of that adoption.

But an ikrarnamah was filed three years after the suit had commenced, dated the 26th January, 1864, in which Soorjocoomar Roy and Jadubcoomar Roy, who were the presumptive reversionary heirs, declared that the suit had their full consent, and that plaintiff might carry on the said suit at his own expense. But we are at a loss to understand how the fact of their being made defendants, as they have been, or giving their consent that the plaintiff should carry on this suit, can entitle the plaintiff to a declaratory decree. It is not because a man who has a right consents to a man who has no right bringing a suit that the man who has no right can maintain it, nor can the making the man who has the right a defendant alter the case. It is still the stranger, with the consent of the reversionary heir, asking for a decree that the adoption was invalid, making the real heir a defendant, to enable him to show, if he can, why the stranger should not have a declaratory decree to that effect.

It appears to us that, even with the consent of the presumptive reversionary heirs, the plaintiff, a stranger, had no right to have a declaratory decree with reference to the validity or invalidity of the adoption.

But a deed of compromise of 1839 was put in evidence, in which the plaintiff, as manager of certain estates which were conveyed to him by that deed of compromise, had an interest in showing that Radhanath had not been legally adopted, and although the plaintiff had not set up that deed of compromise in this plant as one of the grounds on which he sought to have it declared that the adoption was invalid, an issue was raised in the suit whether the plaintiff had a right to question the adoption.

The Judge held that it was clear, on the arguments, that the plaintiff was the next heir, if the adoption of Radhanath should be disallowed; and he proceeded to try the issues, *first*, whether Brojo Rajkishoree had the right to adopt; and, *secondly*, whether Radhanath was legally adopted. The Judge found that Brojo Rajkishoree had no right to adopt, and gave a declaratory decree that the adoption was invalid, and Radhanath was not, under such adoption, the legal son and heir of Muthoornath. The Judge having found the first issue in favor of the plaintiff, it was unnecessary for him to express an opinion on the second issue.

When the case came before this Court on appeal from the decision of the Judge, there was a difference of opinion between the two Judges before whom the case was first heard as to whether the plaintiff had a right to question Radhanath's adoption. It was not whether the plaintiff, as heir of Golucknath, or as heir of Muthoornath, had that right. The case was referred for a third voice, and was heard by me; and it appeared to me that the plaintiff had an interest under the deed of compromise of 1839 to question the adoption. The decision is reported in VIII Weekly Reporter, page 241.

If it had been determined in a suit between the plaintiff and Radhanaths' guardian that the plaintiff had no right to question the adoption, the plaintiff might probably have been bound by that decision if Radhanath had instituted a suit against him with reference to the deed of compromise; and it appeared to

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me that the plaintiff had the right to question the adoption with reference to that deed.

As a single Judge, I had no power to determine any other question than that as to which the difference of opinion prevailed. I had no power to try whether the adoption was valid or not, nor whether, under the circumstances of the case, the plaintiff was entitled to a declaratory decree.

The case has now come back to be tried upon the merits whether the adoption was valid or not, and whether the plaintiff is entitled to have a declaratory decree.

It appears to us that the plaintiff would not be entitled to a declaratory decree, even if he should prove that the adoption was invalid. He has based his right in the suit, as regards Muthoornath's estate, upon the ground that, upon the death of his widow, he would be the heir; and it appears to us that he has failed to show that he was the reversionary heir, and the consent of the real reversionary heirs does not entitle him, as a stranger, to have a declaratory decree, even if he could prove that the adoption was invalid.

The ikrarnamah would, according to English law, amount to champerty, for the real heirs consent to the plaintiff's carrying on the suit at his own expense, with an agreement as to the mode in which the property should be divided amongst them, should he succeed.

We do not mean to say that the law of champerty is a law applicable to the Mofussil; but we think that the Court would be exercising a very unsound discretion, and acting upon a very erroneous principle, if it should allow a stranger to interfere in family affairs, and to have the adoption declared invalid under an agreement between him and the real heirs; that if he could establish the invalidity of the adoption, he should be entitled to a share of the estate.

With regard to his claim to set aside the certificate which was affirmed by the Sudder Court in 1858, the same reasons apply. As a stranger, he has no right to set aside that certificate, and it is therefore unnecessary for us to determine the question which was raised, that as to that part of the suit he was barred by limitation.

The certificates, however, and the suit regarding it, are material features in this case. Radhanath was adopted in 1853, upwards of eight years before the commencement of this suit. His mother, as his guardian in the summary suit for that certificate, which was resisted both by Soorajkooer Roy and Jadubkooer Roy, and by the plaintiff in this suit, established, to the satisfaction of the Judge, and of the late Sudder Court, on appeal, that the adoption was valid. For three years before the commencement of this suit that certificate had been in force. Neither Radhanath nor his mother had attempted, or claimed in any way to interfere with the rights of the plaintiff under the deed of compromise. They were merely acting under the validity of that adoption with regard to Muthooranath's estate, and with regard to that portion of the estate of Golucknath which had not been included in the deed of compromise, and the certificate was not applied for until after the death of Golucknath's widow.

It is clear that the certificate to Golucknath's estate could not entitle either Radhanath or his mother to interfere with any portion of the property of Golucknath, which Golucknath in his lifetime had conveyed away by the deed of compromise. That deed applied only to ancestral property which had descended from Nundcoomar Bose, and not to any property acquired subsequently by Golucknath.

The plaintiff asks in this regular suit to have it declared that Radhanath's adoption is invalid. It appears to us that the *onus* rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person who asks a Court to declare that a thing is invalid is bound to prove that it is so. The Act which enabled the Court to make a declaratory decree does not enable the Court to call upon a man to prove his title, at the instance of one who asks to have a declaratory decree that he is not entitled. But this case seems to have been treated both by the issued raised and the mode in which the evidence was dealt with, as if the defendant

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had been called upon to prove that his adoption was valid, and not that the *onus* lay upon the plaintiff to prove that it was invalid.

The plaintiff has not proved the invalidity of the adoption. He has not proved that Brijo Rajkissoree had no right to adopt, or that Radhanath has not been legally adopted. Radhanath was living in the family, and treated as the adopted son. He had had a decree in his favor three years before this suit commenced, in a suit to which the plaintiff was a party, declaring that adoption to be valid, and that decree had been confirmed by the late Sudder Court three years before this suit commenced. The mother of Radanath appeared as a witness, and deposed that her husband had given her verbal authority to adopt. She and Golucknath, through whom the plaintiff at the time he commenced this suit claimed as heir, and through whom Soorajcoomar Roy and Jadubcoomar Roy, who consented to this suit, claim as reversionary heirs in the Bill which they filed to set aside the will of 1239, prayed that the widow of Muthooranath should adopt under the direction of the Court. That shows that Golucknath did believe that, independently of the will of 1239, the widow had that power. In their answer to the suit filed against them by Hurrymohun, they swore that a paper purporting to be a will of Muthooranath, and of which they annexed a translation, was wholly in the handwriting of Muthooranath. That would be evidence against Golucknath, and those claiming through him as his heirs, that such a document really did exist.

Whether it was actually executed, or so far completed as to become a will, it is not material now to consider, because, whether it was a will or not, it was a paper declared by Golucknath to be in the handwriting of Muthooranath, in which he declared that he had authorized his wife to adopt a son.

It is said both as regards this paper and the alleged will of 1239, that there was a Clause in it stating that three copies had been deposited in certain places, and that those copies were not forthcoming. That remark might have been material if the question had been whether Muthooranath had so far completed the paper as to constitute it his will. The fact of his not having made the deposit of the copies as stated, might possibly have been used as an argument to show that he had not completed the will, but was merely preparing it. The copies could not be deposited whilst the will was in a state of preparation, and not complete as a testamentary disposition; but it is immaterial when we look at the paper merely as a writing under Muthooranath's hand, in which he declared, not that, by that instrument, he gave his wife power to adopt, but that he had already given her such a power. The paper would be evidence of a declaration of fact, though not complete as a testamentary disposition. As against Golucknath's heirs, the non-production of any of those copies is not material, for the paper was produced by Golucknath, and sworn to by him to be in the handwriting of Muthooranath.

We are not prepared to say that a power to adopt may not be proved by the widow alone, without the corroboration of other witnesses. It is not material in this case to decide that point, for the widow is corroborated by that paper of 1237, whether it operated as a will or not; and it is unnecessary therefore to consider whether Muthooranath ever did see or sign the alleged will of 1239, or give instructions for it, or was aware of the paper alleged to be the will of 1239.

It appears to me that the plaintiff has failed to show that the widow had no authority to adopt, and that the defendants have proved that the widow had such authority.

It should be borne in mind that, as regards an adoption by a widow in Bengal, it is against her temporal interests, inasmuch as it deprives her of her inheritance.

With regard to the second issue, whether Radhanath was legally adopted, it is important to remark that the father of the boy who was given in adoption was not called in the former suit to prove that he did sell the boy, and only one of the witnesses who was called in this suit was called on the former occasion. The father of the boy broke down in that part of his evidence in

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which he attempted to show that no ceremonies had been performed. The other witness said that he believed the boy had been sold for Rupees 700, whereas the father said it was for Rupees 550. We do not think that the plaintiff has made out that Radhanath was not legally adopted; and whatever the form of the issue, it appears to us that the *onus* lay upon him to prove satisfactorily to the Court that the proper forms and ceremonies had not been gone through, before he can ask the Court to declare that an adoption which had been upheld by the Sudder Court in a suit in which the plaintiff was a party, was an invalid adoption.

Further, it appears that the plaintiff himself must have been under some impression that there was a valid adoption, because, in the suit for the certificate, he, who up to the time of the commencement of this suit in 1861, seems to have considered that he was the reversionary heir of Golucknath, set up as a ground of defence to the plaintiff's application for a certificate that he had purchased from Golucknath's widow, not that he had purchased the widow's interest (for that would be no answer to the certificate), but that he had purchased from the widow that which was a bar to the certificate, namely, the interest of the reversionary heir. If he believed that he was the reversionary heir, there was no necessity for his purchasing, unless he believed that there were grounds upon which the validity of the adoption might be set up.

We should have added that one of the plaintiff's own witnesses says that Radhanath was legally adopted.

Upon the whole, it appears to me that both the issues ought to be found for the defendant, that the widow had power to adopt, and that Radhanath was legally adopted.

Further, if it were necessary, we should hold that the plaintiff, whether the adoption was valid or not, has no right to a declaratory decree.

The decree of the Lower Court will be reversed, except so far as it orders the plaintiff to pay the costs of Juggodumba Dassee and Gobind Monee Dassee, and a decree will be given for the female defendants with costs of the defendant Brojokishoree in the Lower Court, and the costs of this appeal.

Miscellaneous Appeal from Nuddea.

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24th March.
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RENT SUITS.

Ram Chunder Roy and another, (Plaintiffs) *Appellants*, *versus* Ramrutton and another, (Defendants) *Respondents*.

Before *Bayley* and *Phear*, J. J.

Baboos Romanath Bose and *Cally Prosono Dutt* for Appellants.
Baboo Otool Chunder Mookerjee for Respondents.

When an insolvent's property vests entirely in the assignee, it is not competent to a Court to sell a decree held by the insolvent, merely because the assignee has not claimed the decree.

A Deputy Collector ought not to sell a decree of his own Court in execution of another decree of that Court. He should appoint a manager to realize the first judgment-debt. The provisions of the Civil Procedure Code in regard to non-recognition of adjustment of decrees made out of Court do not apply to rent suits.

This is an application to set aside an order of the Deputy Collector for execution of a decree against the petitioner in favor of one Parbutty Nath Buxee.

The decree was originally made in the Deputy Collector's Court in a suit wherein a Mr. J. White was plaintiff, and the petitioner defendant; but Parbuttee Nath claimed to be decree-holder by virtue of having purchased Mr. J. White's rights and interests in the decree.

On Parbutty Nath applying to the Deputy Collector for execution of the decree, the petitioner objected, *first*, that Parbutty Nath had obtained nothing by his purchase of Mr. J. White's rights and interests in the decree, because at that time Mr. White was insolvent, and all his assets (of which the decree would be one) were therefore vested in the Official Assignee; *secondly*, that he, the petitioner, had satisfied the decree out of Court before the sale thereof to Parbutty Nath.

The Deputy Collector disallowed both these objections. As to the first, he held that "the decree was never vested in the Assignee specially, for it was omitted in Mr. White's schedule. And though the assignee can claim it, he has not done so; and till he does, it remains in the legal possession of the person who now possesses it, Parbuttee Nath Buxee. The Assignee having made no claim to it, it is not in my power to assume that he has any, and protect his interest against his will."

The Deputy Collector here makes a serious mistake of law; for if, at the time of Purbuttee's purchase, all Mr. White's assets were vested in the official assignee, nothing would have passed to Parbuttee by the sale. The petitioner asked him to enquire whether this was so or not, and we think that he acted wrongly, under the circumstances of the case, in refusing to make the enquiry.

We are of opinion also that the Deputy Collector erred in selling Mr. J. White's decree against the petitioner to Parbuttee Churn. That decree was a decree of his own Court, and his duty with regard to it was primarily to cause it to be executed upon the application of any one duly entitled to have the benefit of it. It appears to have been sold in the execution of a decree obtained in the same Court by one Ramrutton against Mr. White. Instead of so selling, it seems to us that the Deputy Collector ought, under the provisions, in that behalf, of Act VIII of 1859, to have appointed a manager to realize Mr. White's judgment-debt. Had he done this, he would have acted with propriety, and would have avoided the appearance of encouraging the practice of trafficing in decrees of Court, a practice which may prevail largely, but is certainly very objectionable. The Deputy Collector refused to entertain the second objection, on the ground that he was forbidden by a rule of the Revenue Board to enquire whether or not a private adjustment had been effected out of Court. On this point also the Deputy Collector was wrong, for the rule of the Revenue Board cannot override the law; and it has been held by this Court that Section 206 of Act VIII of 1859 does not apply to decrees of a Revenue Court.

We may add that it appears to us some grave irregularity must have occurred in the execution of Ramrutton's decree against Mr. White, which has probably led to much of the blundering in this case. It is clear that at the time of the order for execution in Ramrutton's case, or, at any rate, before the sale to Purbuttee, Mr. White died. Now, on Mr. White's death, both decrees for the time being abated, although probably they might both have been revived by proper steps taken. If they were revived, the same person would

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appear as Mr. White's legal representative in both cases, and the confusion which the Deputy Collector exhibits in regard to the effect of the sale to Parbuttee Nath could scarcely have occurred.

On the whole, we are of opinion that the Deputy Collector acted illegally in refusing to entertain, and determined the petitioner's objections on their merits. We therefore quash the order which is complained of, and we direct that the Deputy Collector, before issuing fresh process of execution, enquire, *first*, whether Parbuttee Nath Buxee, by his purchase of Mr. White's right and interest in the decree made in favor of Mr. White against the petitioner, having reference to all the circumstances under which that purchase took place, obtained the right to sue out execution of that decree; and *secondly*, whether the petitioner at any time satisfied that decree by private adjustment out of Court.

The Deputy Collector will be governed by the result of this enquiry in regard to the order which he may make relative to the execution sought. Parbuttee Nath Buxee will pay the costs of the petitioner in this application.

CASE 2371 OF 1867.

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Special Appeal from Moorshedabad.

Gopee Mohun Muzoomdar, (Plaintiff) *Appellant*, versus Mr. J. B. Mackintosh, Manager on the part of the Bengal Coal Company, (Defendant) *Respondent*.

Before *Macpherson* and *Glover*, J. J.

Baboos Romesh Chunder Mitter and *Nilmonee Sein* for Appellant.
Baboo Bhowanee Churn Dutt for Respondent.

Suit to set aside lakheraj title must be valued at eighteen times the aggregate rent payable by the ryots. In the words "suit for land exempt from payment of revenue" of Clause (*d*), Schedule B, Section 11, Act X of 1862, "revenue" means "revenue" payable either to Government or a zemindar.

The question in this special appeal is whether the Lower Court is right in holding that the suit has been improperly valued, and that the stamp fee paid is less than it ought to have been. The Lower Court held that the suit was substantially one for the resumption of lands claimed to be held as lakheraj, and that as such the suit falls under Clause (*d*) of Section 11 of Schedule B of Act X of 1862, under which clause the suit should have been valued at eighteen times the aggregate annual rents payable by the ryots. In special appeal, it is contended that the suit was one which properly fell under Clause (*e*), and therefore was rightly valued.

We think that the Lower Court was right, and that the plaint did not bear a proper stamp. The suit was substantially a suit to resume lands claimed to be held as lakheraj, although this does not appear on the face of the plaint. The plaint, in fact, discloses no cause of action, and is, in itself, bad. It alleges that the defendant's being in possession of the lands in dispute by right of a jote, had not executed a kabuleut, and thereupon the plaintiff instituted a suit under Act X of 1859 for a kabuleut, and that the suit was dismissed, the Revenue Courts holding that no rent was paid for the land. The plaint concludes to the following effect:—"Hence I bring this suit to declare my right to these lands, and for possession."

There is no doubt that the suit was instituted for the one object of setting aside the lakheraj title set up by the defendants; and I have but little doubt that the plaint was framed, as it has been, merely with a view of evading the stamp law.

Then it is said, even supposing it is a suit to resume the land, and to have it declared that the lakheraj title set up by the defendants is invalid, the case still falls under Clause (*e*), and not under Clause (*d*). It is argued that the word "revenue" in Clause (*d*) must be construed as meaning "revenue to Government," and that this is apparent from the fact that "revenue to Government" is the term used in Clauses (*a*), (*b*), and (*c*), to which Clause (*d*) is to be considered as a mere sequel. But we think that (applying the ordinary rules of construction) the fact of the words "to Government" being omitted in Clause (*d*), shows that it was not intended that the word "revenue," as used in that Clause, should be limited, as it was limited in (*a*), (*b*), and (*c*),

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CIVIL JURISDICTION, RENT SUITS.

and that the word "revenue" in Clause (*d*) must be read as meaning revenue or rent to Government, or to a zemindar, or to any other person.

In this view we are confirmed by the language which we find was used in the corresponding Clause in the old stamp law, Regulation XI of 1829. The words used there are—"in suits for lakheraj lands, *i. e.*, lands not paying revenue to Government, the value shall be assumed at eighteen times the amount of annual rent." As the words "to Government" existed in the old Clause, and are omitted in the new, we cannot but presume that the omission was intentional.

We think that this appeal ought to be dismissed with costs.

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Irregularities in a commitment for perjury. At the preliminary enquiry in such a case, the accused must be present as accused, and must have opportunities of cross-examination and of defence.

To a prosecution by a Sub-Registrar for an offence committed before him, the specific sanction of the Registrar is required.

Reference to the High Court, under Section 434, Code of Criminal Procedure, from the Sessions Judge of Nuddea, in the case of Kalichurn Lahoree, convicted of giving false evidence.

Before *Kemp* and *Phear*, J. J.

Phear, J.—On the 21st August, 1867, one Kalichurn Lahoree was committed by the Assistant Magistrate of Meherpoor to take his trial before the Sessions Court of Nuddea for having made a certain false statement on oath before the Sub-Registrar of Meherpoor. By a letter dated the 9th March, 1868, more than six months after the commitment, the Officiating Sessions Judge of Nuddea transmitted the case to this Court, "in order that the commitment, being in his view irregular and illegal," might be cancelled, and the whole proceeding annulled. It appears to me that the course which things have taken from the commencement to the end of this case is such as not to reflect any great credit on the two judicial officers concerned in it.

The facts in order of time seem to be as follows:—On the 5th August one Ramlall Rai and Kalichurn Lahoree appeared before Mr. Coxhead, the Sub-Registrar of Meherpoor. Ramlall Rai desired to have a certain deed registered, which purported to have been signed both by himself and Kalichurn Lahoree; and he had procured the attendance of Kalichurn by means of a Registrar's summons. Each of them then made a statement before Mr. Coxhead on solemn affirmation. The result of these statements, in the mind of Mr. Coxhead, is described by this gentleman in a letter which he immediately wrote to the Registrar of Nuddea. The letter runs thus:—

"*5th August*, 1867.

"SIR,—Under Section 20 of Act XX of 1866, I have to procure your sanction before instituting any prosecution for an offence under that Act. Two parties, the attendance of one of them had been brought about by a summons, appeared this day before me as Sub-Registrar. Both parties admitted their signatures to the deed, but one of them asserted that the contents of the deed were unknown to him; that a stamp paper, to which he, before anything was written thereon, had attached his signature, had come through some means or other, of which he was ignorant, into the hands of the other party; and that that party had filled up the deed, had fabricated a document, and had sought to bind him by a transaction which had no existence whatever. I examined both parties, and propose to put Kalichurn Lahoree on his trial, or rather hold the preliminary inquiry into such trial for making a false statement on oath before me. Of course either perjury by one party, or forgery by the other, had been committed.

"I send you the papers, with a request that you will return them on perusal, and give your sanction to the institution of the proposed prosecution. The 13th of this month is the day fixed."

To this letter Mr. H. Bell, the Registrar of Nuddea, replied on the 9th August in these words:—

"With reference to your letter No. 57, dated the 5th August, 1867, you can make over the case to the Magistrate. But which party are you going to send over?"

Mr. Bell's question is not altogether an unnatural one, although, no doubt, it was not strictly necessary for his information.

Mr. Coxhead, in his letter, had already furnished an answer to it, though he had not disclosed the actual part which Kalichurn had played in the transaction, and Mr. Bell could not gather, from the Sub-Registrar's words, what ground there was for charging the one side with perjury, rather than the other side with forgery. He might therefore well ask for something more to enable him to exercise his discretion in regard to sanctioning a specific charge being made.

It is perhaps as well to remark here that Mr. Coxhead's conclusion, that "of

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course either perjury by one party, or forgery by the other, has been committed," is not a logical conclusion from anything which he had stated in his letter. Also, it ought not to be forgotten by judicial officers that all contradictions on oath by opposing witnesses do not necessarily involve perjury, nor is the making of a document without authority always forgery. And I am bound to say, on perusal of all the depositions in this case, that I should hesitate long before I should upon them convict either Ramlall or Kalichurn of the offences specified respectively.

It is not clear what was the exact course which Mr. Coxhead pursued upon receiving the Registrar's reply to his letter. But it appears that on the 20th August he, in his capacity of Assistant Magistrate, took examinations on solemn affirmation of Kalichurn Lahoree and Ramloll Rai; that he then adjourned the investigation till the morrow, when he examined four more witnesses, also on solemn affirmation, before him as Assistant Magistrate. Having done this, he committed Kalichurn Lahoree for trial by the following instrument:—

"I, Thomas Edward Coxhead, Assistant Magistrate in charge of Meherpoor, do hereby make against Kalichurn Lahoory the charge that he did, on the 5th August, make before the Sub-Registrar of Meherpoor, T. E. Coxhead, a false statement on oath; in that, when the Sub-Registrar questioned him on a deed that had been brought for registry, he said that he knew nothing about the subject-matter of the deed, and that he had no conversation with Ramlall Rai about the subject treated of in the deed, or that there was any arrangement between them with reference to such subject-matter, and that he did not know how Ramloll Rai became possessed of the deed, or of the stamp paper containing his signature, and that he did thereby commit an offence punishable under Section 91 of Act XX of 1866, triable by the Court of Session, and I direct that he be tried by the said Court on the said charge."

This document, for the first time in the case, exhibits who was the person accused, and what was the matter of accusation. No complaint against Kalichurn Lahoree, either made by the Magistrate or any one else, preceded the investigation, for Lahoree was himself solemnly affirmed, and examined as a witness at that investigation, and there seems to have been no period at which his position was changed until the commitment was made out against him.

The charge upon which the Assistant Magistrate commits for trial is in this document expressed with a generality and vagueness which, in my judgment, is exceedingly improper. Of all criminal charges which can be made, perhaps the charge of perjury is that which the ends of justice require to be the most carefully and accurately worded. The more general the allegation of falsehood, the less is the risk in putting it forward, and the greater the difficulty of rebutting it. It is therefore the right of the person accused of perjury to have the statement which he is charged with having falsely made distinctly and separately pointed out to him, and I will venture to say that no Court can safely and satisfactorily arrive at a judicial conclusion relative to a charge of perjury unless its investigation be directed singly to each alleged false statement, with the view of ascertaining, *first*, whether it was made at all; *secondly*, whether, if made, it was true or untrue; and, *thirdly*, whether, if untrue, its untruth was present to the mind of the person making it. Now, the charge presented by Mr. Coxhead's commitment mentions at least four statements alleged to have been made by Lahoree, each one of which may or may not have been made, may or may not be true, and may or may not have been falsely uttered by Lahoree, quite independently of the others. The accused person is entitled to have a judicial determination with regard to each of them. The measure of his criminal conduct would vary with the result. Supposing, for instance, that the Court should hold it *not* proved that he committed perjury in solemnly affirming "that he knew nothing about the subject-matter of the deed, and that he had no conversation with Ramlall Rai about the subject treated of in the deed, or that there was any arrangement between them with reference to such subject-matter," but at the same time

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should think it made out that he *did* commit perjury in affirming that he did not know how Ramloll Rai became possessed of the deed. In such a case it is obvious that, although the letter of the law would have been broken, still the offence committed would have been insignificant. It appears to me that the charge of perjury, for the trial of which the commitment is made, should contain a distinct assertion with regard to *each* statement intended to be characterized as perjury, that it is untrue in fact, and that the accused person knew it to be so when he made it. And it is not the less necessary that this should be so, because an alternative charge can by law be made. Indeed, the cases of alternative charges are, in my opinion, exactly those in which it is requisite that the prosecution should be most closely held down to the obligation of proving the two elements of perjury just referred to, because it is in those that the prosecution is most liable to consider that its responsibility ends with simply showing that two contradictory statements have been made by the accused person.

On the whole, then, it seems to me that Mr. Coxhead's instrument of charge and commitment is irregular in a very important respect; but I am not prepared to say that it is therefore invalid.

I think, however, that it ought to be quashed for another reason, namely, that it was not made upon such a preliminary enquiry as the law prescribes that a Magistrate should hold before he can properly commit for trial. It is clear that it is necessary to such an enquiry that the accused person (or, under certain circumstances, his agent,) should be present, that the witnesses, whose evidence is to be the foundation of the commitment, should be examined before him, and that he should have the opportunity of cross-examining them. Generally, too, there should be a complainant, who can be made responsible for the preferring of a false charge, although, in some cases, a Magistrate may take cognizance of, and probably hold an enquiry with regard to, an offence which has come to his personal knowledge, without waiting for a complaint from a third person. However, in all cases alike, there must be an accused person present, *viz.*, some one against whom a definite criminal charge is made, either by the Magistrate himself, when it is legitimate for him to make one, or by another complainant. In this case there was no complaint preferred by a third person; for if Mr. Coxhead, the Sub-Registrar, can, for this purpose, be distinguished from Mr. Coxhead, the Assistant Magistrate, it was the latter, and not the former, who made the charge, as appears by the commitment also. Had the fact been that the Sub-Registrar ostensibly prosecuted, it is perhaps doubtful how far such prosecution ought to have been entertained without the Registrar's specific sanction, and certainly no such sanction was given, for Mr. Bell, when he wrote, expressed himself as not knowing whom his subordinate intended to prosecute.

But assuming that this was a case in which the Assistant Magistrate might have proceeded without a complaint (as to which I desire to express no opinion), he was at any rate bound to put Lahoree in the position of an accused person, and the preliminary enquiry contemplated by the Criminal Procedure Act could only commence from that point. Lahoree ought to have been aware, during the whole time the witnesses were being examined before him, that he was the person intended to be incriminated by their evidence, and also what was the nature of the charge sought to be established against him; he ought also to have been told that he might cross-examine the witnesses if he thought fit. It appears to me that, during the enquiry before Mr. Coxhead, Lahoree never stood in the situation of an accused person at all. His own evidence was taken on solemn affirmation in the same way as that of the other witnesses. He had no opportunity of cross-examining the other witnesses, because, according to Mr. Coxhead's own representation, no charge was made against him until the whole of their evidence was given, and the commitment written out. In truth, Mr. Coxhead, instead of making a preliminary enquiry as to the matter of any specific complaint against Lahoree, seems to have conducted a general investigation of a somewhat abnormal kind, and then to have committed

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Lahoree for trial on a charge which was the result of that investigation. I do not know what authority a Magistrate has to take evidence on oath, except in reference to some matter of complaint made against some specified person, and I am certainly of opinion that proceedings like this will not, in law, justify a commitment. No one can, I think, be properly committed for trial except after a preliminary enquiry, during the whole of which he has known the charge made against him, and has been afforded all due means of defending himself.

In my opinion, therefore, the commitment of Kalichurn Lahoree for trial at the Court of Session, made by Mr. Coxhead on the 21st August last, ought to be quashed. And here I feel bound to express my regret and surprise at the extraordinary delay which has taken place in bringing this case to the notice of the High Court.

The commitment was made on the 21st August, 1867. The case came on for trial before the Sessions Judge some time, I suppose, in September, and the prisoner's vakeel then objected to the validity of the commitment. The Sessions Judge, as he says, thought the objection valid for several reasons, and thereupon the trial was postponed for further enquiry. However, nothing seems to have been done until the re-opening of the Courts after the Dusserah vacation, when the Sessions Judge came to the opinion that the whole commitment was irregular and illegal, and that the case must be referred to the High Court to have the commitment quashed. Accordingly the case seems to have been entered in the November statements of the Nuddea Court as having been referred to the High Court for that purpose.

Notwithstanding this, neither the record, nor any letter from the Sessions Judge, did, in fact, go up to the High Court; and on the 3rd of January the Registrar of the High Court, acting on the entry in the statement, wrote to the Sessions Judge for explanation. It does not appear clearly what notice the Sessions Judge took of this letter. On the 29th February the Registrar of the High Court wrote another letter to the Judge, requesting his attention to the letter of 3rd January, and to this the latter replied on the 9th of the following month (March). In this reply the Judge admitted that the record of the case, and the necessary covering letter, had not yet been sent up by him to the High Court as it ought to have been. He took the whole blame of the omission upon himself, saying that he had been under the impression that the papers had been sent with the statement in November, and that he was quite unable to account for their not having been so sent.

I confess myself as little able to find an excuse for the Judge, as he is to suggest one for himself; and I am compelled to conclude that he has shown neglect of duty, which is culpable; for not only is his original default unexplained, but no reason is advanced why it should not have been discovered and repaired when the Registrar wrote on the 3rd of January as readily as it was two months afterwards on the 9th of March.

Kemp, J.—I concur in quashing the commitment.

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HIGH COURT CIRCULARS AND LETTERS.

CIRCULAR ORDER No. 2.

To

ALL CRIMINAL JUDICIAL AUTHORITIES.

Dated Calcutta, the 6th April, 1868.

HIGH COURT, &c.
CRIMINAL SIDE.
Before *Peacock*, C. J. and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J. J.
Limits on sentences of whipping in case of persons previously convicted.

In a recent case, certain questions as to sentences of whipping, and the maximum of punishment which can be awarded under Section 46 of the Code of Criminal Procedure, were referred to a Full Bench of this Court for determination.

The attention of all officers entrusted with the administration of criminal justice is called to two points which have been decided by the majority of the Judges composing the Full Bench Court.

It has been decided—

I.—That when a person, who has not been "previously convicted," (using the term in the sense in which it is used in Section 4, Act VI of 1864,) is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of these offences *in addition* to imprisonment or fine for the other or others; but that it is not illegal to sentence him to *one whipping in lieu of all other punishment.*

II.—That when a person, who has been "previously convicted," is convicted at one time of two or more offences, he may be punished with one, but only, whipping *in addition to* any other punishment to which, under Section 46 of the Code of Criminal Procedure, he may be liable.

The Court take this opportunity of impressing upon all officers vested with power to pass sentences of whipping, that such sentences should be passed with the utmost caution, and with due deliberation; and that if any doubt is felt, either as to the legality or propriety (in any particular case) of passing a sentence of whipping, such a sentence ought not to be passed.

CIRCULAR No. 4.

To

ALL CIVIL AND SESSIONS JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 2nd April, 1868.

HIGH COURT, &c.
CIVIL SIDE.
Before *Peacock*, C. J., and *Loch*, *Bayley*, *L. S. Jackson*, and *Macpherson*, J. J.
The Criminal side of a Judge's Court is not to close, save on days when a total cessation from business is necessary and usual.

Several of the Zillah Judges appear to have entirely closed their Courts on the Criminal as well as on the Civil side for the period of the Dusserah Vacation, and to have abstained, during the whole of that period, from attending to business, receiving or opening communications from the Superior Court, despatching returns which were due, or doing any act whatever of an official kind.

Such a practice is justified by nothing in the law or in the orders of this Court; it causes great inconvenience. The Zillah Judges are therefore reminded that, under the Circular Order (Nizamut Adawlut) No. 8, dated 23rd March, 1838, issued under the orders of Government, which has never been rescinded, the Court of Session "must never be closed for the despatch of Criminal business, except on those days only when a total cessation from all business is necessary and usual;" and, moreover, that even on the Civil side of their Courts, it does not follow that because there is no sitting of the Court, therefore every official duty is to be suspended.

Extract (Para. 10) from letter No. 492, dated the 6th April, 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Tirhoot.

A Sessions Court must either convict or acquit. It has no power to discharge a prisoner.

10. I am to point out to you, with advertence to the case of Juggomohun Patuck (2 Statement 5), that an accused person tried before your Court must be either acquitted or convicted, and must apparently be called on for his defence. (*Vide* Sections 363 and 372 of the Code of Criminal Procedure.) An

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order for the *discharge* of the prisoner is one which can be made by a Magistrate under Section 225 or 250 of the Code. But no similar power, otherwise than on full acquittal, appears to have been given to the Court of Session, it being apparently assumed that the preliminary investigation has established a *primâ facie* case against the accused.

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THE

REVENUE, CIVIL,

AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL, PRIVY COUNCIL DECISIONS, SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c, &c.

VOLUME V.

No. 10.—May 18.

(To be continued in bi-monthly parts, on the 3rd and 18th of every month.)

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CASE 83 OF 1867.

Application for Review of Judgment in Miscellaneous Appeal No. 373 *of* 1867, *dated the* 11*th September*, 1867.

Bindabun Chunder Sirkar Chowdry and another, *Petitioner*, *versus* Mr. A. B. Mackintosh, *Opposite Party*.

Before *L. S. Jackson* and *Hobhouse*, J. J.

Mr. Piffard and *Baboo Nilmadhub Bose* for Petitioner.
Baboos Romeshchunder Mitter and *Nilmonee Sein* for Opposite Party.

This is an application to review our judgment dated 11*th September last, in the execution case of Bindabun Chunder Sircar and another against Mr. A. B. Mackintosh.*

The word "judgment" in Section 105 of the Civil Procedure Code does not mean judgment in appeal. The Section does not permit execution to be taken out summarily against a man marrying a woman against whom a judgment *has been* given, or is pending in appeal.

The grounds upon which error is alleged are, in fact, the two grounds which were mainly urged before us at the hearing of the special appeal. They are, *first*, that Mr. Mackintosh was bound by a previous decision against him upon the very point now raised, *viz.*, his liability under the decree against Mr. Harris. This point, however, has not been greatly pressed by the learned Counsel, Mr. Piffard; and looking at the circumstances of the case, we see no reason to think that our ruling on that point was erroneous. We think, and we believe, we so held at the time, that the determination of the point of law against Mr. Mackintosh was so accompanied by a determination of the Court, for other reasons, not to execute the decree against him, that he was not bound at that time to appeal against the decision upon the first point.

The second question is whether, looking upon the matter as one for decision now, we were right in holding that Mr. Mackintosh was not liable in this execution proceeding.

The suit was one commenced against the first husband of Mrs. Mackintosh, Mr. Harris, in the year 1841. It is only necessary to say that Mr. Harris died while that suit was pending; that Mrs. Harris was brought upon the record as defendant, and the judgment was given against her on the 13th April, 1844; that she appealed against that judgment, and the judgment was affirmed in 1848. Mrs. Harris, in the meantime, that is to say, in 1846, married Mr. Mackintosh, against whom execution is now sought. In our first judgment in this case we were of opinion that the decree was not against Mrs. Harris (now Mrs. Mackintosh) personally, but was wholly against her in her capacity of representative of her deceased husband.

It appears that on that point we fell to a certain extent into error, and that although the original defendant was the husband, yet the decree embraced an award of wassilat accruing after the husband's death, and during the possession of the widow, and for which consequently she would be personally liable. Whether it was right to make that award in the decree upon the suit against the husband, is a question into which it is now too late to enter; but, rightly or wrongly, it seems judgment was given against her personally, as well as in her representative character. The case then stands that, for certain wassilat decreed in that suit, Mrs. Harris was personally liable. Mr. Mackintosh married her after judgment had been given, and while the appeal against that judgment was pending; and the question is whether, under such circumstances, execution can be taken out against Mackintosh. Mr. Piffard relies, and wholly relies, upon the terms of Section 105 of the Civil Procedure Code. That Section is in these words: "The marriage of a woman, plaintiff or defendant, shall not cause the suit to abate, but the suit may, notwithstanding, be proceeded with to judgment, and the decree thereupon may be executed upon the wife alone;" and if the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also.

Mr. Piffard's contention is, that the word "judgment" in this Section must include the final judgment. We think he went so far as to contend that it would include the final determination of wassilat; but at any rate, he contended

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that it must include the determination of the appeal in the suit. Upon the best consideration which we can give to the Section, it appears to us that we should not be justified in extending the liability to summary proceedings in execution which that Section allows against the husband beyond the strict words of the Section itself. The part of the Procedure Code from which this Section is taken, is that part which relates to "suits previous to judgment;" it is altogether disconnected from, and independent of, that portion of the Code which relates to appeals, and we feel satisfied that if the Legislature had meant to declare that execution might be taken out against a husband marrying a wife against whom a judgment had been given, or was then pending in appeal, its intention would have been expressed in distinct terms, and in a different portion of the Code. That being our view of Section 105, the execution-creditor is seeking now to execute this decree against Mr. Mackintosh, who was neither a party to the suit nor a personal representative of any such party. There is no provision of the Code which, under such circumstances, will enable proceedings to be taken against him in execution; but the decree-holder, if he seeks to make him liable for the debt of the wife whom he has married subsequent to the giving of judgment against her, must establish that liability; it seems to us by separate suit. We think therefore that although we fell into a slight error of fact in our judgment in this case, it does not affect the determination of the appeal, and consequently this application should be rejected with costs.

APPEALS 358, 359, 360, 361, 362, AND 363 OF 1867.

In the matter of Ranee Ismaid Koer and another in Miscellaneous Appeals Nos. 358, 359, 360, 361, 362, *and* 363 *of* 1867.

4th April.

Before *Peacock*, C. J., and *Seton-Karr*, *L. S. Jackson*, *Macpherson*, and *Hobhouse*, J. J.

Messrs. R. E. Twidale and *C. Gregory* for Petitioners.

This case was referred to the Full Bench on the 6th August, 1867, *under the following orders recorded by Loch and Hobhouse*, J. J.

Execution of a decree for money will not be stayed, merely because security is given, unless good cause for staying it be also shown.

Hobhouse, J.—In the case before us the petitioner was appellant in an appeal against a decree for money, and he applied, under Section 338, Act VIII of 1859, for stay of execution on security given.

Mr. Doyne, for the petitioner, when called upon to show cause why execution should be stayed on security given, contended that, inasmuch as the decree was a decree for money, it was not necessary for him to show cause at all, for that the practice of this Court in decrees for money, as interpreted by its decisions, was at once to stay execution without cause shown on good and sufficient security being given, and he relied on a decision of the late Sudder Dewanny Adawlut, page 240, 24th December, 1861, Mahomed Wajeed Ally Shah, appellant.

In that decision the learned Judges remark as follows:—

"The principle laid down by the Court regarding the staying of the execution of decrees appears to be this:—When the decree is for land or other immoveable property, the decree-holder is allowed to execute his decree, unless good and sufficient cause for staying it be shown. When the decree is for money, the Court, in the exercise of its discretion, under Section 338, allows the debtor to stay execution on giving good and valid security, and we think that course should be followed in the present case."

In these remarks the learned Judges seem to lay down the principle, that when a decree is a decree for immoveable property, then execution shall not be stayed unless good and sufficient cause be shown; but that, on the other hand, when a decree is a decree for money, execution may at once be stayed on good security given, whether good and sufficient cause be shown or not.

I venture to think that this principle is not warranted by any terms in the law (Section 338), and that, on the contrary, the words "for sufficient cause shown" and "if sufficient cause be shown" apply equally to all decrees,

whether for moveable or immoveable property, and to hold that execution of decrees of any kind may be stayed without sufficient cause shown, seems to me equivalent to holding that a decree shall be stayed "by reason only of an appeal,"—a proceeding which the law expressly forbids.

I believe my brother Loch, who was one of the Judges in 1861, now concurs in this view; but as it is at variance with a previous decision of other learned Judges, I would suggest that it be submitted for the decision of a Full Bench.

The question is whether or not execution of a decree for money may, on security given, be stayed without sufficient cause shown.

Loch, J.—I concur in submitting the points to the consideration of a Full Bench.

THE JUDGMENT OF THE FULL BENCH.

Peacock, C. J.—*(concured in by the other Judges).* I think it is quite clear that if a party wishes to stay execution under Section 338 of Act VIII of 1859, he is bound to show sufficient ground to the Court for so staying it. Under Section 36, Act XXIII of 1861, when an order is made for the execution of a decree against which an appeal has been preferred, the Court, if it thinks fit, may require security to be given for the restitution of any property which may be taken in execution of the decree or the value thereof.

It may be very inconvenient to a plaintiff who has been looking forward to the receipt of a certain sum of money which is due to him, if, as soon as he obtains a decree for it, he should be prevented from levying the amount, merely on the application of the judgment-debtor, and upon his giving security. Such a measure might be most injurious to the plaintiff, who has depended upon the realization of debts due to him as a means of meeting his own liabilities.

The foregoing remarks apply to money decrees, but the rule above laid down is equally applicable to decrees for immoveable property and to other decrees.

Miscellaneous Appeal from Backergunge.

CASE 468 OF 1867.

16th April.

Ramdhun Roy and others, (Judgment-debtors) *Appellants, versus* Tarreenee Churn Roy and others, (Decree-holders) *Respondents.*

Before *Phear* and *Hobhouse*, J. J.

Baboos Nilmonee Sein and *Gireejasunker Muzoomdar* for Appellants.
Baboo Hemchunder Banerjee for Respondents.

An application for execution was made by the decree-holder. The Lower Court, on the intervention of a third party, stayed issue of execution, and a year after, the intervenor's case being disposed of, ordered that the decree-holder might have his execution. *Held*, that that order was a proceeding keeping the decree alive.

Our decision in this case, No. 648 of 1867, turns entirely upon whether or not the order of the Sudder Ameen passed on the 3rd August, 1861, was a proceeding to enforce a decree or to keep a decree in force within the meaning of the words of Section 20, Act XIV of 1859. The second ground of special appeal is not pressed.

We think that this order was a proceeding to enforce a decree. It seems that the decree-holder applied on the 28th August, 1860, for execution of his decree. The necessary money for tullubana was paid into Court on the 15th September of the same year. On the 24th September, in consequence of an application made by a third person, the Court held its hands in the matter of the application for execution. There was, strictly speaking, no stay of proceedings, because no stay of proceedings was needed. The Court merely abstained from making an order upon the application for execution until the matter of the claim had been enquired into and determined. We have not had before us any detail of the steps that were taken, but it appears that that enquiry, in one form or another, continued until the 3rd August, 1861, and on that date the Court passed an order which was, in effect, this, that it was no longer necessary to stay execution of the decree; that the applicant was entitled to have his execution. We find that the Chief Justice, in delivering a

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judgment of Full Bench in the case which is reported in Vol. II. Wyman's Reporter, page 279 mentions several acts, either of the applicant or of the Court, which would or might be a proceeding within the meaning of Section 20, Act XIV. Amongst others, are orders on the part of the Court, such as issue of process of execution and service of notice in the prosecution of any proceeding, and so on. It seems to us that the order which was passed by the Sudder Ameen on the 3rd August, 1861, was an order of the Court consequent upon the application of the judgment-creditor first made on 28th August, 1860, and therefore that it was such an order as might, within the meaning of the judgment of the Full Bench, be a proceeding to enforce execution of a decree.

There is no question before us at all as to *bonâ fides*. There could not well be in special appeal; but the question, as we understand it, simply requires us to say whether, as a matter of law, that order of the Court can be taken to be a proceeding within Section 20, Act XIV. As I have said it can be; and as the Court below has found it is, it follows that the special appeal must be dismissed, and it is accordingly dismissed with costs.

CASE 114 OF 1867.

16*th April.*

Regular Appeal from Bhaugulpore.

Baboo Kanto Loll and others, (Plaintiffs) *Appellants, versus* Baboo Greedharee Loll and others, (Defendants) *Respondents.*

Before *Kemp* and *E. Jackson*, J. J.

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Appellants.

Baboos Juggodanund Mookerjee, Unnoda Pershad Banerjee, Romesh Chunder Mitter, Nibnadhub Bose, Shib Doyal Banerjee, Ooppendurchunder Bose, Rajeendra Coomar Bose, and *Dwarka Nath Mookerjee* for Respondents.

Under Mithila law, the son's right to ancestral property accrues from his birth, and he can compel the father to divide such property when he pleases. Only pressing necessity can justify the father in alienating such property while his son is a minor, and the Court, in deciding as to such necessity, will not be content with being shown merely that decrees against the father were existing, but will enquire how the obligations on which those decrees are based came to be contracted. Alienations made before the son's birth will hold good under any circumstances.

The plaintiffs in this suit are Kanto Loll and Mussamut Doolaroo Kooer, mother of her minor son, Mohabeer Purshad. They claim to recover certain estates, ancestral property, which the fathers of Kanto Loll and Mohabeer Purshad have alienated. The fathers, Bhikaree Loll and Buzrung Suhai, are still alive, and are parties to the suit. The defendants are the purchasers from the father of the landed estates in question.

The plaintiffs allege that the sales by the fathers of the ancestral estates were caused by the reckless, extravagant way in which their fathers lived, and that the money raised upon these sales, and the loans, to pay off which some of the sales were had recourse to, were expended on immoral purposes, and that such sales are invalid as against them, the plaintiffs, unless special grounds of necessity can be made out to support them.

The defendants, on the other hand, state that the sales were justified by the necessities of the family, and that many of them were held in execution of decree.

The Principal Sudder Ameen has dismissed the plaintiff's suit, except as to 7 beegahs of one estate.

It is admitted that the law which will govern this case is the Mithila law.

The first question which is raised before us relates to the status of the son as regards ancestral landed estate inherited by his father from his grandfather under the Mithila law; and it was contended by the plaintiff's vakeel that, as regards such estate, the son is from his birth co-owner with the father, and the father, except on pressing necessity, and for certain special reasons only, can alienate such estates. It is admitted that the Court must look to the Vivada Chintamonee to ascertain the Mithila law current on this point, and passages in that commentary have been referred to in the course of the argument. It is clear that that commentary does not lay down the law on the point in the same precise terms as either the Mitackshara or the Dyabhaga. We are not shown that it is anywhere distinctly declared in that commentary, as it is in the Matackshara, that the son's right to ancestral property accrues upon his birth, or that he is from

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his birth co-owner with his father in such property, or that he can call upon his father at any time to divide such property with him. The son's rights in ancestral property are therefore not distinctly placed in such high terms by the Mithila law as by the Mitackshara. But there are passages in the chapter on partition of property during the lifetime of the father, which certainly tend to the conclusion that the right of the father, to deal with ancestral property in the lifetime of his son is limited. It is laid down that "self-acquired property shall be divided equally, or unequally, or not divided at all according to the father's pleasure. The partition of such property depends entirely on his own will, for the sons have no ownership therein." It is argued from this, that there is certain property in which the sons have ownership, and that that property must be ancestral property. This passage would show that, whenever the right of the son may accrue, there is certain property in which the son has, even during his father's lifetime, an ownership; and looking to the analogy of the Hindoo law as laid down in the Mitackshara, and to the admitted fact that, on points where the Vivada Chintamonee is silent, the Mitackshara is to be taken as a guide, we think that that property is ancestral property which has devolved to the father and the son from the grandfather.

But the question still remains, what description of ownership a son possesses in such property. If he is unable to compel his father to divide such property with him during his father's lifetime, his ownership, though inherent in him from his birth, may not actually come into force until his father's death. There is no direct clause in the Vivada Chintamonee which allows a son to force his father to a partition of ancestral property in his father's lifetime. The clause above alluded to declares the father's power to divide his property among his sons during his lifetime, and points out that, as regards certain property, the father is his own master, and can act as he pleases. As regards ancestral landed property, he does not possess the same right, because the son has an ownership in such property. For the purposes of this suit, however, it is necessary also to determine at what time the ownership of the son commences, whether at his birth or after a partition has been made, either with the consent of the father, or against his consent. The Vivada Chintamonee not laying down any rule upon the point, we must decide this point also on the Mitackshara; and there it is laid down that the ownership accrues on the son's birth, and that the son and father are joint owners in such property from the son's birth; and it has been held by several Benches of this Court, after some difference of opinion, that the son can compel his father to divide such property whenever he pleases. Applying these principles to this case, the sons may, we think, be considered in this case to be suing to obtain their share of their grandfather's property. The fathers are parties to the suit as defendants; though, as they have alienated the estates, they do not oppose the sons. However repugnant at first sight it may appear to principles of justice and equity that the sons should be allowed to recover landed estates which the fathers have sold, still if the right of the father to sell any portion of such estate can be questioned under the law, and the right of the son to a portion of such estate is clear, under that law, the sons must recover. There are certain circumstances in this case which go to show that the purchasers from the father were aware that their title to the estates they purchased was not a valid title, the purchasers having allowed some of the estates to fall into arrears of Government revenue, and having re-purchased them under a new title, hoping thereby to cover the defects of the title gained by the first purchase. If the defendants were then acquainted with the defect in their title, and purchased with such knowledge, there can be little doubt that the consideration for such purchases was proportioned to the risk they ran as to title being afterwards declared invalid. There seems to be no sufficient evidence that the money for which the estates were sold was, as alleged by the plaintiffs, expended in immoral purposes. There is no distinct evidence as to what was the income of the plaintiff's father. One of them is said to have been a sheristadar in the Purnea Civil Court. It is not even stated in the evidence whether the whole of the landed estate has been dissipated; but it has been in

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the argument before us mentioned, that that has been the effect of the sales; so much so, that even the family house has been disposed of; and there has not been any direct contradiction of the fact by the pleaders of the defendant. Several of the sales which have taken place have been in execution of decree, the decrees only showing that the father had incurred debts. The purchasers, defendants, allege that the existence of these decrees is sufficient to support their case that there was a necessity for the sale; that they cannot be required to go behind the decrees, and the facts apparent on the face of the litigation and to point out the exact mode in which the sums borrowed by the fathers were spent. In favor of this contention, we are referred to a decision of the Sudder Court, and to a precedent. (Wyman's Reporter, Vol. II, page 164, Mussamut Bhoorna Koer and others) It seems, by the last decision, that the Judges did not consider the existence of the decrees alone to be a sufficient justification for the sale. They went on to look to the rest of the evidence regarding the sales, and came to the conclusion that the father and the purchasers had both acted *bonâ fide*, and that the money for which the sales were ultimately incurred was not spent in dissipation and extravagance. But there was in that case evidence that large sums of money were required for special purposes for the benefit of the family. There is no evidence to that effect in this case. The purchasers in that case were therefore able to justify their purchases, not only on the ground of the decrees, but also upon other evidence. As to the decrees in this case, they certainly afford no sufficient evidence as to the necessity of the sales by the fathers of their sons' interests in the property. The purchaser at a sale in execution of decree purchases only the rights and interests of the person whose property is put up for sale. If his interests are limited except under certain contingencies, the purchaser must be prepared to prove those contingencies, if he is desirous to make out that under the sale anything more than the interest of the debtors passed to him. In the present case there is no evidence to show that the father required to raise money for any pressing necessity for the benefit of the family. All that is proved is that the money was obtained from time to time far beyond the income of the parties and to that extent that the whole ancestral estate, as well as ancestral house, was ultimately alienated.

It is admitted that all such estates as were sold by either father previous to the birth of his son are valid and good; but there is a question as to the date of the birth of Mohabeer Purshad, son of Buzrung Suhai. We think that the date of birth alleged by the purchasers is sufficiently proved; and in disposing of the case of each sale, we shall act upon that finding. Mouzahs Rajpore, Alinuggur, and Anundpore were sold in execution of a decree in September, 1858. As it is proved that Mohabeer Purshad was not born until November, 1858, the sale of the 8-anna share of these estates by Buzrung Suhai holds good under all circumstances. As regards the remaining 8 annas, the only evidence as to the necessity for a sale by Bhikaree Lall is, that the estate was mortgaged by Bhikaree Lall to Asmutoonissa. The decree recites no necessity for the mortgage, and there is nothing to justify the sale, except the fact of the debt. The son, Kantoo Lall, is therefore entitled to recover his share of this estate, which will amount to four annas. It seems to us that the evidence clearly proves that Buddunhand, the ostensible purchaser at this sale, was a mere benamee for the defendant Muddun Thakoor, and the subsequent purchase by Muddun Thakoor at a sale for arrears of revenue gives no new title to the purchaser.

Eight annas of mouzah Shahpore Tamoolee, which is also claimed by the plaintiffs, is not proved to our satisfaction to have been ancestral property, and we do not credit the evidence that the money to purchase it was obtained from the moneys left by the grandfather. But the sale would stand good, even if the property had been ancestral. Eight annas of this was sold in execution of a decree on the 8th August, 1853, to Kantoo Lall, and the evidence shows that Kantoo Lall was equally a benamee for Muddun Thakoor. As regards Buzrung Sahai's share, the sale was valid, having been made before the birth of Mohabeer

Purshad. As regards Bhikaree Lall's share, it seems to be proved that, although 8 annas of the estate was sold as above stated, the remaining 8 annas remained in the possession of Bhikaree Lall and Buzrung Sahai; and on their default to pay up the Government revenue, the whole estate was brought to auction, and was purchased by Muddun Thakoor. The plaintiffs therefore have no right in this estate.

The lands in Lowa Lugan and Akhila were purchased by Gridharee Lall and Runjeet Pauree on the 19th July, 1856. To these, therefore, no claim on the part of Mohabeer Purshad can be held valid, the purchase being before his birth. But as regards the share of Bhikaree Lall, although some small portion of the debt was incurred on account of payment of Government revenue, the greater portion was to raise loans; and we hold therefore that there has not been a sufficient necessity shown for the sale, and that the plaintiff, Kantoo Lall, can recover to the extent of 4 annas, *viz.*, one-half of his father's share.

As regards the 8 annas mouzah Bozoorj Nowasa and the other lands which were at first mortgaged, and afterwards the mortgage was purchased by Mussamut Towfa, we think that the plaintiff cannot recover, as the mortgage was given *bonâ fide* to enable the fathers to purchase the remaining 8 annas of that mouzah, which was, in fact, purchased by the sum so raised. The transaction was one for the benefit of the estate; and though it may not have succeeded, it is not one which we consider we should, under present circumstances, set aside.

The other defendants have not been represented before us, and no argument has been addressed to us to justify the alienations made to them. These seem all to have been made after the birth of Mohabeer Purshad.

To sum up, we are of opinion that the plaintiff Kantoo Loll is entitled to a declaration that the sale of 4 annas mouzahs Rajpore, Alinagur, and Anundpore, and of 4 annas Lowa Lugan and Akheea has not been justified as against him, and the plaintiffs, Kantoo Loll and Mohabeer Purshad, to the same declaration as respects 4 annas mouzah Bozoory Nawasa as against Beebee Luzika, and as respects 8 annas of 20 beegahs mouzah Sultanpore and mouza Hosseinpore against Purmanund Misser, and as respects 8 annas of beegahs 5-10, mouzah Anundpore, and 8 annas of beegahs 2, mouzah Lodipore, against Dhaleep Singh, and as respects 8 annas Lahkeraj land beegah 1-5 in Chowdhrydih, and 8 annas of beegahs 2-10 in mouzah Ludeepore Khoord against Purmanund, and we decree possession to the said plaintiffs respectively of the above shares of their estates. As regards all other estates claimed, we dismiss the plaintiff's suit.

We think that this is not a case in which we should award mesne profits against the purchasers.

The orders of the Principal Sudder Ameen are modified to the extent above noted.

We direct that plaintiffs do pay their own costs of suit, and those of Mussamut Towfa, and that the remaining defendants do pay their own costs.

Miscellaneous Appeal from 24-Pergunnahs.

CASE 18 OF 1868.

17*th April.*

Sreenath Bose, (Decree-holder) *Appellant, versus* Nubbeen Chunder Bose, (Judgment-debtor) *Respondent.*

Before *Phear* and *Hobhouse*, J. J.

Baboos Mohendro Lall Shome and *Peary Mohun Mookerjee* for Appellant.
Baboos Unnoda Purshad Banerjee and *Tarruck Nath Dutt* for Respondent.

When mesne profits calculated on actual returns have been awarded against defendant, he cannot plead that the returns

The only question before us in this case, is whether or not the Judge of the Lower Appellate Court has estimated mesne profits by a proper standard. It appears that the first Court decided that the amount to be decreed for mesne profits was the actual amount realized by wrong-doer while in posession. The Judge reversed that decision, holding that the plaintiff was not entitled to profits

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were greater in his hands, and by his energy, than they would have been in plaintiff's.

which the defendant obtained from the land if they were obtained by the use of labor, energy, and influence employed by the defendant which the plaintiff would not have employed. He accordingly remanded the case to the Sudder Ameen, in order that he might ascertain the amount of the profits as rent which would have been realised from the land if leased out at the same rent as the neighbouring land. It seems to me that this question is really concluded by the decisions which have been passed by a Full Bench and by a Division Bench of this Court. Mesne profits are of the nature of damages given in order to reimburse the owner of the land for the loss which he has sustained in consequence of his having been wrongfully kept out of possession. Now this loss must generally be measured by the actual profits arising from the usufruct of the land during that time. Certainly it appears to me that the wrong-doer cannot be heard to say that these profits do not represent the owner's loss. It does not lie in his mouth to say that the owner would not have realized as much from the land as he, the trespasser, did. No doubt it may well be that the loss to the owner would be greater than the actual produce during dispossession; as, for instance, in the case where the wrong-doer, while in possession, chose to let land remain waste and unfruitful which was capable of yielding profit. And we think that these alternatives are pointed at in the judgment of the Full Bench delivered by the Chief Justice, and reported in the Full Bench cases, the special number of Sutherland's Weekly Reporter, page 40. The Chief Justice says:—"We are clearly of opinion that when a party is declared entitled to a decree for mesne profits, he is entitled to recover, as those profits, such sums as may have been collected and appropriated by others in wrongful possession, or such sums as he (the party ousted wrongfully) would have collected had he been in possession, and which he was prevented from collecting by having been kept wrongfully out of possession." This last is the alternative to be taken in the event of the first-mentioned profits being less than the second, and we think the same view was adopted by the learned Judges who decided the case reported in Volume VIII of the Weekly Reporter, page 103. In the case before us it seems to be admitted that the wrong-doer has obtained extraordinary profits out of the lands, but also that he has obtained them by the expenditure of certain capital. Under these circumstances, the remand order of the Judge must be reversed, and the case must go back to the Lower Appellate, in order that that Court may ascertain what was the amount of net profit actually received by the defendant after making due allowance for such expenditure as may have been incurred in order to obtain those profits. The special appellant must have the costs of the special appeal.

CASE 1861 OF 1867.

22nd April.

Special Appeal from Hooghly.

Jogendronath Mullick and others, (some of the Defendants) *Appellants, versus* Rajnarain Palooye, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Baboo Obhoy Churn Bose for Appellants.
Baboo Ashootosh Chatterjee for Respondents.

A mortgagee in possession being in position of a trustee is bound to keep the property (in this case a thatched house) in repair, and is entitled to recover his outlay with interest.

We think that the finding of the Principal Sudder Ameen is wrong. The special appellant is the mortgagee, and he is in possession of the mortgaged premises, consisting of a thatched house. It is said the original debt, with interest, has been paid from the usufruct of the mortgaged premises, and this fact is apparently undisputed. But the mortgagee claims to be allowed for repairs and re-construction of the house.

The first Court allowed this. The Principal Sudder Ameen finds that, without the authority of the mortgager, the mortgagee could make no repairs, so as to charge the mortgagor. He further assumes that, as the deed of mortgage was not produced, it must be presumed that there was no stipulation that

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the mortgagee was to be entitled to any deduction on account of sums advanced by him for repairs.

Under the law as administered in this country, a mortgagee in possession is in the position of a trustee. The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor, and must not do any thing to diminish the security upon which the money was lent. In this case the mortgaged property was a thatched house. To allow it to fall out of repair, and to become uninhabitable, would have been diminishing the value of the security on which the money was advanced, and preventing the mortgagor from paying off the debt from the usufruct. It is the bounden duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed to charge for the same with interest. (Cooke's Law of Mortgage, page 344; Macpherson on Mortgages, page 85.)

We uphold the decision of the first Court, and reverse the decision of the Principal Sudder Ameen with costs and interest.

The special appeal is decreed with costs and interest.

Special Appeal from Shahabad.

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CIVIL JURISDICTION.
RENT SUITS.

CASE 2076 OF 1867.

Nurkoo Ram and another, (Defendant) *Appellants, versus* Ramjooraon Singh and others, (Plaintiffs) *Respondents.*

Before *Loch* and *E. Jackson*, J. J.

Baboos Onoocool Chunder Mookerjee, Gopal Lall Mitter, and *Nilmadhub Sein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Respondents.

There is no attachment made of the debtor's property in execution proceedings under Act X of 1459. A notification that if the debt be not paid by a certain day, such property will be sold, is all that issues, and there is nothing in the law to prevent a debtor from disposing of his property before that date.

The question before us is as to the effect of a notification issued under Section 5, Act XI of 1859. Does it operate as an attachment by the Civil Court?

The plaintiff in this case held decrees for rent, and in execution applied to the Collector for the sale of certain revenue-paying property belonging to the debtor. Before the sale took place, the parties agreed to the postponement, in order that the claim might be compromised, and the execution case was struck off the file on 18th July, 1865. On the 19th August following, the debtor sold the property to the special appellants, and part of the purchase-money was paid to plaintiff in liquidation of another decree he held against the debtor. As no compromise was effected, the decree-holder applied again for the sale of the property, and was opposed by the purchasers from the debtor, and the Collector allowed the claim, and refused to sell. Plaintiff then brought the present suit to set aside the order of the Collector, and to have the property declared liable for his decree, and both the Lower Courts have given a decree in his favor, the Judge in appeal holding, in effect, that a notification under Section 5, Act XI of 1859, operated as an attachment.

There is no process of attachment in execution of decrees for rent, as is prescribed by Act VIII of 1859 in execution of decrees of the Civil Court. The procedure in execution is of a more summary character. There is apparently no seizure in the case of immoveable property, but merely an advertisement of sale. Now, where the property to be sold is other than the tenure upon which the arrear accrued, and consists of land paying revenue to Government, the law, Section 110, Act X of 1859, requires that it should be sold under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land revenue. The law applicable to cases of this kind is Act XI of 1859. Section 5 of that law prescribes that a sale for demands not being land revenue, but recoverable by the same process as arrears of land revenue, shall be made after the issue of a notification specifying the nature and amount of the demand, and the latest date on which payment thereof will be received has been affixed for a period of not less than fifteen clear days preceding the date fixed for payment in the Office of the Collector, or other officer duly authorized to hold sales under the Act, &c., &c.

Now this law does not provide that there is to be an attachment previous to the issue of notification, and as regards estates sold in satisfaction of arrears of Government revenue, or other demands due to Government, it would be superfluous to make such attachment, as any private alienation of the estate would not prevent its sale for the sum due to Government. But would this be the case where the property is sought to be sold in execution of a decree for rent? The law, Section 110 of Act X of 1859, prescribes the mode in which sales of this kind are to be conducted, and the first step to be taken is the issue of a notification under Section 5, Act XI of 1859. That notification is for the information of the debtor and of the public, that it may be known that an arrear or demand is due from the debtor, which will be received if paid on or before a fixed date. There is nothing of the nature of an attachment in this notification. The law does not require that the name of any estate belonging to defendant, which may be liable to sale for the debt, should be entered in the notification. It is simply a public call on the debtor to pay his debt by a fixed date. By Section 6 of Act XI of 1859, the Collector, after the latest day of payment, has to issue a notification to be affixed in his own Office, and in the

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Court of the Judge of the district, specifying the estates or shares of estates to be sold, and the date on which the sale shall commence. This notification corresponds to the proclamation of sale fixed in execution of decrees under Section 219, Act VIII of 1859; and were a private transfer of the property to be made after the issue of such notification, it would probably prove no obstacle to the sale of the property by the judgment-creditor; but till such notification is issued, there appears nothing in the law to prevent the debtor alienating his property. The notification, under Section 5, is, as observed above, merely a public demand upon the debtor to pay his debt by a fixed date. There is nothing under such circumstances to prevent his selling any property he has for the purpose of realizing the money due. If the money were paid in by the fixed date, the decree-holder could not question the validity of the sale by the debtor to a third party; and in, instead of paying the debt, the debtor spent the money for other purposes, the innocent purchaser for good consideration is not to suffer. There is this difference as to its effect between attachment in execution and the notification under Section 5, Act XI of 1859, that when once the former has taken place, the property is under the custody of the law, and the owner can do nothing with it without the permission of the Court; while in the case of a notification the property remains in the hands of the debtor, and he is at liberty to deal with it as he sees best, because it has not come under the custody of the law; that whereas a *bonâ fide* sale under the latter circumstances would be valid, it would not be so where attachment has been made, as any and every alienation after attachment is forbidden by law. The Legislature, in its anxiety to render the procedure in cases under Act X of 1859 rapid, has omitted in some instances to provide protection for the parties, and it appears to me that the present is one of the cases for which no provision has been made in the law. The rule by which property may be sold in execution of a decree is prescribed, but no provision is made to prevent the debtor from dealing with that property as he pleases before the proclamation of sale is issued. The Legislature indicated the mode in which the sale is to be conducted, but failed to provide the necessary protection to the decree-holder before such sale could take place. Under this view of the case, I think the judgments of the Lower Courts should be reversed with costs.

Jackson, J.—I also think that the special appeal should be decreed with costs, and the judgment of the Lower Court reversed. Whether the notification for sale would operate to prevent the debtor alienating the property or not, there was no notification in force at the time the sale in question in this suit took place. And even the creditor was so fully aware that the property was in the hands of the debtor to alienate and sell, that when the debtor did sell the property, he, far from raising any objections to the sale, received from the debtor a portion of the purchase-money in liquidation of another claim which he held against the debtor. He acquiesced in the sale, and derived benefit from it; and he cannot now turn round on the purchaser, and ask to have the sale set aside as invalid. The sale is, in my opinion, a valid one; but even if there was any doubt in my mind on this point, the conduct of the creditor would have made it valid.

Reference under Circular Order No. 17, *dated the* 17*th June*, 1863, *from the Sessions Judge of Mymensingh, in the case of Nassir versus Chundee and others.*

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12*th March.*
CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

Before *Peacock*, C. J., and *Seton-Karr*, *L. S. Jackson*, *Phear*, and *Macpherson*, J. J.

The following judgments of the Full Bench were delivered in the above case :—

Macpherson, J.—This case has been sent to a Full Bench by a Division Court, before whom it came when sitting as a Court of Revision. As we unfortunately do not agree in the view we take of the points referred, it becomes necessary for me to express my opinion first.

1. When a person who has *not* been "previously convicted (using the term in the sense in which it is used in Section 4, Act VI, 1864,) is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of these offences, in *addition* to imprisonment or fine for the other or others; but it is not illegal to sentence him to *one* whipping in lieu of all other punishment.

2. When a person who *has* been "previously convicted," is convicted at one time of two or more offences, he may be punished with one, but only *one* whipping in *addition* to any of the punishment to which, under Section 46 of the Criminal Procedure Code, he may be liable.

3. Construction of Penal statutes. Cumulative punishments Powers of Magistrate.

The question is, what is, the maximum of punishment to which a Magistrate of a District can legally sentence a person convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code.

Section 46 of the Criminal Procedure Code enacts, that it shall be lawful "for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the Indian Penal Code, which such Court is competent to inflict. Such penalties, when consisting of imprisonment, to commence,—the one after the expiration of the other * * *. Provided that if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict."

Section 22 prescribes the extent of punishment which a Magistrate was, at the time of the passing of Act XXV of 1861, by his ordinary jurisdiction, competent to inflict, "imprisonment of either description not exceeding the term of two years, including such solitary confinement as is authorised by law, or fine to the extent of Rupees 1,000, or both imprisonment and fine in all cases in which both punishments are authorised by the Indian Penal Code."

When the Code of Criminal Procedure became law, whipping was not a punishment which could be awarded under the Penal Code. Subsequently, however, Act VI of 1864 was passed, and the punishment of whipping was thereby authorised in certain cases. The question arises whether, in cases in which whipping may be awarded under Act VI of 1864, whipping can be said to be one of the penalties prescribed by the Indian Penal Code, which the Magistrate is competent to inflict, within the meaning of Section 46 of the Criminal Procedure Code.

I think that it is one of these penalties.

The preamble of Act VI of 1864 declares, that "it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping." And Section 1 declares that "in addition to the punishments described in Section 53 of the Indian Penal Code, offenders are also liable to whipping under the provision of the said Code."

Reading the preamble and this first Section together, it appears to me that their effect is this: That Section 53 of the Indian Penal Code must be read as if whipping were mentioned in it as one of the punishments to which offenders are liable under the provisions of the Code, and that all whipping, under Act VI of 1864, is to be deemed to be whipping under the provisions of the Indian Penal Code. The Whipping Act is not very clearly expressed: but this appears to me the only meaning that can be attached to the words "under the provisions of the Indian Penal Code," which occur in the preamble and the first Section.

The second Section specifies the offences for which whipping may be awarded in lieu of any other punishment. It is as follows:—"Whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code; that is to say, &c." The effect of these words I under-

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stand to be, that Sections mentioned in this second Section are to be read respectively as if words to this effect had been added to each :—"Or in lieu of such punishment (or punishments) the offender may be punished with whipping."

It is urged that, as this second Section says that whipping is to be in lieu of any punishment to which the convict may be liable under the Indian Penal Code, it is clear that the whipping itself cannot be under the Indian Penal Code. But it appears to me that "any punishment" must be read as "any *other* punishment," and that this was the intention of the framers of the Act is shown by Section 3, in which, under precisely similar circumstances, the word "other" occurs. Moreover, I have said that I consider that, by reason of the preamble and the first Section, all whipping, under Act VI of 1864, is to be deemed to be whipping under the Penal Code; and if I am right in that opinion, then the whipping, under Section 2, as well as under the other Sections of the Act, must be deemed to be under the provisions of the Penal Code.

On the whole, I think that whipping is one of the penalties prescribed by the Penal Code within the meaning of Section 46 of the Criminal Procedure Code.

Then is it a punishment which a Magistrate is competent to inflict? At first I had doubts on this point, the powers of a Magistrate being defined in Section 22, and whipping not being one of the punishments there mentioned. But it appears from Section 8, Act VI of 1864 that a Magistrate of a District has the power to punish with whipping; for, unless the Magistrate was intended to have that power, it would have been quite unnecessary to enact that "no sentence of whipping shall be passed by any officer inferior to a subordinate Magistrate of the first class, unless he shall have been expressly empowered by the local Government to pass sentences of whipping" The exclusion of inferior Magistrates from the exercise of the powers would seem to import the possession of the power by superior Magistrates.

As a Magistrate may pass a sentence of whipping, and as a sentence of whipping, under Act VI of 1864, is to be deemed a sentence passed under the provisions of the Penal Code, I think further that whipping is a punishment which a Magistrate is (in the words of Section 46), "by his ordinary jurisdiction; competent to inflict," that is to say, I think that a Magistrate is, by his ordinary jurisdiction, competent to sentence, not only to the punishments mentioned in Section 22 of the Criminal Procedure Code, but also to whipping, either as the only punishment, or as an additional punishment as provided in Act VI of 1864.

What then is the greatest amount of punishment which a Magistrate can award without exceeding twice the extent of punishment which he is, by his ordinary jurisdiction, competent to inflict.

There is no doubt that in cases of convictions, at the same time, of two or more offences punishable by imprisonment and fine, the Magistrate has power to sentence, in the whole, to four years' imprisonment and fine, with one year's additional imprisonment if the fines are not paid. But it is more difficult to say what is the limit in cases in which whipping has been awarded.

According to the literal interpretation of Section 46 of the Criminal Procedure Code, a Magistrate (in the view I take of his powers) might sentence, upon several convictions at the same time, to four years' imprisonment with fine, and another year's imprisonment in lieu of payment, and two whippings, for Section 46 says only that "the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict." But these words of Section 46 must be read with the provisions of Act VI of 1864; and under that Act it appears to me that in no case can more than one sentence of whipping be passed. Such a thing as double whippings is not contemplated by Act VI of 1864. This appears to me from the general tenor of the whole Act, and is shown more especially by the 9th, 10th, and 11th Sections, which provide that when whipping is awarded in addition to imprisonment, the whipping shall

be inflicted immediately on the expiry of fifteen days from the date of the sentence, or (in the case of an appeal having been made) immediately on the receipt of the order of the High Court confirming the sentence, that "in no case, if the cat-o'-nine tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or if the rattan be employed, shall the punishment exceed thirty stripes," and that "no sentence shall be executed by instalments."

With these provisions in the Act, and in the absence of any indication of an intention that a man should be liable to be sentenced at one time to more than one whipping, I am of opinion that, under Section 46, only one whipping can be awarded.

But although I think a Magistrate would be acting within the letter of the law in passing a sentence amounting in all to four years' imprisonment with whipping, and a fine of one thousand rupees, or an additional period of imprisonment for one year, in my opinion he would not exercise his discretion wisely in passing such a sentence on any person who had not previously been convicted of the like offence. For it may be very much doubted whether it was the intention of the Legislature to authorise whipping in the case of a second offence, except when the ordinary punishment had been tried and failed, or in the case of a first offence if the whipping was to be accompanied by imprisonment under a simultaneous sentence. The punishment of whipping for a first offence is one which recommends itself, not only from its deterrent qualities, but from this, that it does not expose the offender to the risk of contamination and demoralization which he necessarily incurs if sent to prison. The latter object is defeated if one who has not previously been convicted (using the terms in the sense of being convicted before the commission of the offence for which he is about to be punished) is sentenced to imprisonment as well as whipping.

The Whipping Act is one in the construction and carrying out of which many very difficult questions arise. And it is impossible to warn Magistrates and other officers sufficiently strongly to be cautious and moderate in acting under it. In no case can a Magistrate be justified in passing a sentence of whipping if he has any doubt as to his legal competency to do so.

The answer which I would give to the question put to us is—a Magistrate is competent to sentence a person convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code to imprisonment for four years with whipping, and to fines amounting to one thousand rupees, or in default of payment to a further period of imprisonment not exceeding one year. This would be the maximum aggregate punishment which any Magistrate could pass under Section 46 of the Criminal Procedure Code.

Phear, J.—The punishment of whipping is given by Act VI of 1864. It seems to me, upon consideration of the preamble and the words of the 1st Section, that the Legislature, in passing that Act, intended to make the punishment of whipping to be read thenceforth as if it had been included among the punishments prescribed by the Indian Penal Code.

The preamble is in these words:—"Whereas it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping, it is enacted as follows."

Section 1 enacted that "in addition to the punishment described in Section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code."

Section 8 of the same Act also seems to me by implication to give power to a Magistrate to pass sentences of whipping. No sentence of whipping, it says, shall be passed by any officer inferior to a Magistrate of the first class, unless he shall have been expressly empowered by the local Government to pass sentences of whipping.

I cannot escape from the conclusion, that Act VI of 1864 intends to insert in the Penal Code among the punishments therein prescribed the punishment of whipping, and also to empower a Magistrate to pass sentence of whipping.

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But this Act does not authorize a Magistrate to pass simultaneously several sentences which shall take effect in succession to one another. That provision is given solely by the Code of Criminal Procedure.

The 46th Section of that Act says:—"When a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code which such Court is competent to inflict, such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years, and provided also, that if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict.

I think that a Magistrate has no power to inflict a succession of punishments, except under the provisions of this Section 46 of the Code of Criminal Procedure. It is therefore necessary to consider what are the sentences which that Section authorizes a Magistrate to pass to take effect in succession.

It is clear that unless this Act has been altered by subsequent legislation, the different penalties of the Indian Penal Code to which this Section refers are the penalties prescribed by that Code at the time that the Criminal Procedure Act was passed. It is also clear that the proviso at the end of the Section, unless similarly altered by subsequent legislation, means now, as it meant when it was passed, in referring to the ordinary jurisdiction of the Magistrate, the ordinary jurisdiction such as it then existed.

I believe there is no contention but that the ordinary jurisdiction of the Magistrate, as it then existed, is that which is mentioned in Section 22 of the Code of Criminal Procedure, *viz.*, that he may inflict imprisonment up to a term of two years with a fine commutable to imprisonment for six months; so that it appears to me, unless Section 46 of this Act has been altered by subsequent legislation, the Magistrate, while he has powers of passing sentences simultaneously to take effect in succession the one to the other, can only in such accumulated sentences give the penalties which were prescribed by the Penal Code as it existed at the time of the passing of the Criminal Procedure Act, and that he was then limited in the aggregate to a term of four years' imprisonment, with two fines commutable into six months' imprisonment each, or twelve months in the whole.

Now it is not suggested that the meaning of Section 46 of the Criminal Procedure has been changed by the Legislature otherwise than by the passing of the Whipping Act as it is termed, or Act VI of 1864. But I am unable to find any thing in Act VI which goes the length of effecting such a change. When the Legislature by that Act inserted the punishment of whipping into the Penal Code for the general purposes of that Code, it did not, as it seems to me, intend to alter the meaning or scope of any other existing Act of Legislature. No doubt this Act gave powers which no previous Act gave; but excepting the Penal Code, it did not make any other Act utter language which it did not utter before. If the Legislature had, when passing it, intended to do this, it could have done so expressly. It clearly, to my mind, has not expressly done it, and I do not think that there is any such necessity arising out of the provisions of Act VI of 1864, remembering that it is a penal Act, as to make us come to the conclusion that such a change was effected by implication.

On the whole, therefore, it seems to me that if a Magistrate exercises the powers which are given to him by Section 46 of the Criminal Procedure Code, and passes an accumulated sentence, he must confine himself to the penalties prescribed by the Penal Code before it was altered by Act VI of 1864. He cannot include in that sentence the punishment of whipping, and he cannot

exceed in the total twice the extent of his ordinary jurisdiction as defined by Section 22 of the Criminal Procedure Code.

L. S. Jackson, J.—I have arrived at the same conclusion as my brother Macpherson, and generally for the same reasons.

It is remarkable enough that Act VI of 1864, which legalizes the punishment of whipping, is expressly designed by its terms to become, I may say, a portion of the Indian Penal Code, but contains no reference whatever, from first to last, to the Code of Criminal Procedure. If the result of that omission were that neither the Criminal Procedure Code nor any other Act except the Indian Penal Code, was altered or affected by the provisions of Act, VI of 1864, it seems to me that the result would be that no officer, or any Court whatever, would be competent to inflict the punishment of whipping, because; if Section 22 of the Criminal Procedure Code were unaffected by the terms of Act VI of 1864, the several Courts and officers therein enumerated would still be bound by the limits of punishment laid down in that Section, and would have no authority to go beyond those limits by awarding a sentence of whipping.

But looking to the terms of Section 8 of Act VI of 1864, it appears to me that the Legislature intended to invest, and did invest, all officers not inferior to a subordinate Magistrate of the first-class with the power of passing sentences of whipping, and that it reserved to the local Government the power of authorizing inferior Magistrates also to exercise the like power. The result, therefore, of the amalgamation, so to say, of the Whipping Act with the Indian Penal Code, and of the operation of that Act upon the Code of Criminal Procedure, will be, in my opinion, to insert in Section 53 the punishment of whipping as one of those to which offenders are liable under the provisions of the Code, to insert in the several Sections of the Penal Code enumerated in Sections 2, 3, and 4 of the Whipping Act, the punishment of whipping as a punishment to which a person committing the offences described in the respective Sections will be liable, either in lieu of another punishment or in addition to the other punishment, as the case may be, also to add to Section 22 of the Code of Criminal Procedure the punishment of whipping as included within the ordinary jurisdiction of the Court of Sessions, of the Magistrate of the district, and of subordinate Magistrates of the first-class without condition, and subordinate Magistrates of the second-class when expressly empowered by the local Government as punishments each was competent to inflict; and lastly to introduce into the Schedule annexed to the Code of Criminal Procedure, in the column of punishments, that of whipping in the several cases and under the respective conditions which are prescribed by the Whipping Act. That being so, and the limit of ordinary jurisdiction of the Magistrates being enlarged to the extent I have said, it seems to me to follow, that in the case of more than two convictions of the offences specified in Section 2 of the Whipping Act, a Magistrate would be within the strict letter of the law if he passed sentence of punishment not exceeding four years' imprisonment with fine as permitted by Section 22, and whipping not exceeding thirty stripes if inflicted with the rattan; for it appears to me that in that respect also there is a modification of Section 46 of the Code of Criminal Procedure in respect of this, that it would not be lawful for the Magistrate or for any Court to sentence an offender, no matter how many offences he might be convicted of, to more than thirty stripes if the rattan be the instrument of punishment. This is the conclusion at which I have arrived after careful consideration of the subject; and I only add, that I entirely concur in the observations of my brother Macpherson, both as to the very numerous and difficult questions of construction presented by the Whipping Act, and also as to the extreme caution which it behoves Magistrates and Courts of Justice to employ when putting in force the provisions of that Act.

Seton-Karr, J.—There is no doubt, as has been very justly remarked by my learned brethren who have preceded me, that there are several questions of nicety and difficulty arising in the construction of what is known as the Whipping Act.

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On the whole, I am inclined substantially to agree with the conclusions arrived at by Mr. Justice Campbell to be found in the printed papers furnished to us for this reference, which conclusions are dated the 24th of September, 1866. The judgment is quoted in the margin.

"I think there is not the least doubt that a Magistrate can sentence for offences so punishable to two years' imprisonment and fine, or six months in default of payment,—total two and a half years and in case of two or more offences, up to four years and fine, and one year's imprisonment in default, total five years.

Flogging cannot be inflicted in lieu of any part of the punishment or punishments which can be inflicted for any one offence. When flogging is inflicted in lieu of any other punishment, no other punishment can be inflicted for that offence. And when a Magistrate has punished otherwise for two offences, I think that he cannot flog for a third offence. But in cases in which flogging can be awarded *in addition* to other punishment, it seems to me that the Magistrate having jurisdiction to try the case, can inflict it in addition to the full measure of his ordinary powers, *e. g.*, to two years and six months, and to stripes in addition, or to five years and stripes in addition, and the maximum number of stripes cannot be doubled."

But of course it becomes necessary for me to state more particularly what my conclusions are. I deem it unnecessary to set out at length the various Sections which have been already quoted by my learned colleagues.

The first conclusion at which I have arrived is, that by Section 1 of Act VI of 1864 whipping is added to Section 53 of the Indian Penal Code, and that it thereby becomes a seventh punishment which officers dealing with that Code are empowered to administer.

Then comes the difficulty which has been already pointed out, *viz.*, that the Whipping Act contains no reference to, or mention whatever of, the Code of Criminal Procedure, and yet that the Magistrate ought to be held to administer the Code of Criminal Procedure when he administers the Whipping Act. I cannot myself doubt that when a Magistrate administers any of the punishments defined in the Penal Code with the Whipping Act added to it, he does at the same time administer, and is bound by the Code of Criminal Procedure. I do not think that he administers whipping under Act VI of 1864 alone, and not under the Criminal Procedure Code.

But when we come to look at Section 46 of that Code, which is a very important Section, altering, as I believe it does, the old Criminal Law of the country as formerly administered, and empowering Magistrates, in certain cases, and with certain restrictions, to give cumulative punishments, I do not think that we are justified in applying that particular Section to the punishment of whipping which can or may be administered by Act VI of 1864. I think that an express mention of this Section 46 would be necessary in Act VI of 1864 to enable a Magistrate to make whipping cumulative for first offences; and without such a distinct proviso, I shrink from holding that offenders can be whipped and imprisoned for such first offences.

I do not lose sight of the difficulty which arises, if we lay it down that the Magistrate does administer the Criminal Procedure Code in all cases, and yet that he is shut out from one particular Section of it in some cases, but I am bound to look at the intention of the Legislature in making whipping a legal punishment at all.

Looking to the objects of the Whipping Act, it is quite clear to me that that Act empowered Magistrates to administer the punishment of whipping to two broad and distinct classes of offenders: *Firstly*, offenders whom it was thought necessary to punish with whipping in lieu of other punishments; and, *Secondly* more hardened offenders who, on conviction of certain specified offences, were thought fit subjects for whipping in addition to other punishments. But I am unable to come to the conclusion that Act VI of 1864 contemplated that whipping should be cumulative, except in the case of hardened offenders.

For instance, a man not being an old offender is arraigned, tried, and convicted on three distinct thefts. It appears to me that it would be competent for a Magistrate to inflict on him two years and six months for one theft, and two years and six months for a second, and not more than this for three or four instances of thefts tried together. I do not think that it could have been

the intention of the Legislature, and it certainly is no where so expressly provided by Act VI of 1864, that a Magistrate having given the maximum of imprisonment for two offences of theft, could flog for a third offence, or that having given a sufficient amount of punishment for a one offence, he could, in addition to imprisonment, inflict, a whipping for a second.

I am quite clear, on the other hand, that in the case of hardened offenders contemplated by Section 4, he might give the maximum of imprisonment which he was competent to award, and might give a whipping of thirty stripes in addition, because I think that the law itself expressly provides for this. Further, I do not think that in any case, looking to the provisions of Section 10 of the Act, he could give cumulative whippings; that is to say, he could not give thirty stripes *plus* stripes.

These are the conclusions at which I have arrived after some discussion, and a full consideration of this question; and it appears to me that my conclusions do not substantially differ from the practical effect of those arrived at by Mr. Justice Phear, except in the instances of offenders previously convicted, and I may not take exactly the same view of every portion of the Act, or of all the nice questions which have arisen out of it.

Peacock, C. J.—There are two questions which have been submitted for our opinion: *First*, what is the limit of jurisdiction of a Magistrate with full powers in respect to imprisonment under Section 46 of the Criminal Procedure Code?

There seems to have been no difference of opinion upon this point. A Magistrate with full powers, upon convicting a prisoner at the same time of several offences, may sentence him to twice the amount of punishment which such Magistrate is, by his ordinary jurisdiction, competent to inflict; that is to say, to punishment not exceeding, in the aggregate, four years' imprisonment, and fines not exceeding two thousand rupees, the ordinary limit of his jurisdiction being two years' imprisonment, and fine not exceeding one thousand rupees. (*See* Section 22, Code of Criminal Procedure.)

I am speaking merely of the extent of the jurisdiction of the Magistrates. The punishment for any one of the offences cannot exceed that for which the offender is liable under the Penal Code, and the punishments should be awarded severally.

The difficulty which seems to have occurred was whether, if each of two offences were punishable with imprisonment of two years and fine, the Magistrate, if he should fine as well as imprison to the full extent of two years for each offence, could also direct by his sentence, that in default of payment of the fines the offender should suffer additional imprisonment.

I have no doubt that he may do so. I take the case of theft as an illustration.

Theft by the Penal Code is punishable with imprisonment of either description for a period not exceeding three years, or with fine, or with both. The ordinary jurisdiction of the Magistrate of the District is imprisonment of either description not exceeding the term of two years, or fine to the extent of one thousand rupees, or both imprisonment and fine. Upon conviction of a prisoner of one offence of theft, the Magistrate could sentence him to two years' imprisonment, and to pay a fine of one thousand rupees. By the 64th Section of the Penal Code, he might also direct by the sentence, that in default of the payment of the fine, the offender should suffer imprisonment for a certain term, regulated by the 65th Section, in excess of any other imprisonment to which he might have already sentenced the prisoner.

By the 65th Section of the Penal Code, the term for which the Court directs the offender to be imprisoned in default of payment of fine is not to exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence if the offence be punishable with imprisonment as well as fine. Thus the Magistrate might, for one offence of theft, sentence a prisoner to two years' imprsonment, and a fine of one thousand rupees, and direct that in default of the payment of the fine the prisoner should be imprisoned for a term not exceeding

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half a year, that being one-fourth part of the imprisonment to which the Magistrate might sentence him for the offence.

Section 64 of the Code of Criminal Procedure directs that when a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person, for the offences of which he shall have been convicted, to the several penalties prescribed by the said Code which such Court is competent to inflict, such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a larger period than fourteen years, and provided also that if the case be tried by a Magistrate, the punishment shall not, in the aggregate exceed twice the extent of punishment which such Magtstrate is, by his ordinary jurisdiction, competent to inflict.

If he convicts, at the same time, of two offences of theft, he may sentence for each offence to imprisonment for two years, and a fine of one thousand rupees. He may direct, with regard to the fine in each case, that in default of payment, the offender shall suffer imprisonment for half a year, which sentences, in effect, will subject the offender to two years and a half imprisonment in each case unless the fines be paid. By payment of both the fines, the prisoner will be free from the imprisonment awarded in default of the non-payment of the fines.

The next question is whether, if a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

There is no doubt that if the Magistrate sentences the prisoner for one only of the offences of which he is convicted, he may sentence him to whipping, if whipping is warranted by Act VI of 1864. But I am clearly of opinion that if the Magistrate sentences the prisoner for both offences, whipping cannot form a portion of the punishment for either.

It is a rule of construction that penal statutes, or statutes which subject men to punishment, are to be construed strictly; and it appears to me that if there is in the whole Statute Book one act more than another to which that rule ought to be applied, it is Act VI of 1864, which subjects adults to the punishment of whipping.

The recital in that Act is, that it is expedient that in certain cases offenders should be liable under the provisions of the Indian Penal Code to the punishment of whipping.

Section 1 enacts that, "in addition to the punishments described in Section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisons of the said Code."

The word "are" cannot have been intended to mean that whipping was one of the punishments which the Indian Penal Code authorized, because it was not so. That punishment was purposely and advisedly omitted from the Code. The word is used in a future sense, and means that after the passing of this Act, whipping shall be one of the punishments to which offenders shall be liable under the Penal Code. The Act speaks from the time it took effect. The meaning is the same as if it had said "offenders are now, by virtue of this Act, liable to whipping," &c. Section 53 of the Penal Code, which is the Section referred to in Section 21 of Act VI, contains merely a description of the punishments to which offenders are liable under the Code; that is to say, that the punishments therein enumerated are the several classes of punishment to which, by the various Sections of the Code, offenders of different kinds are made subject. The effect of Section 1 is to add whipping as one of the several classes of punishments, and instead of there being six, as there were under the Penal Code, there are now seven classes of punishments. Death is one of the

punishments; imprisonment is another; fine is another; whipping is another. But it is not because death is one of the punishments enumerated in the Penal Code, that death is a punishment provided by the Code for every offence mentioned in the Code. Such also is the case as regards whipping.

Section 2 of Act VI of 1864 says that whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code. It does not say, and it could not say, that by the Penal Code he was liable to be whipped. But it might say that by the Penal Code, as amended by this Act, he shall be liable to be whipped. Take the case of theft. Section 2 of the Act does not say that by the Penal Code a man who commits theft is liable to be whipped, but it says that in lieu of giving him the punishment inflicted by the Penal Code, *viz.*, three years' imprisonment and fine, he may be punished with whipping. Sections 3 and 4 render offenders liable to whipping in lieu of or in addition to, the punishments imposed by the Penal Code.

Section 46 of the Code of Criminal Procedure says, "that when a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offence of which he shall have been convicted to the several penalties prescribed by the said Code." But it does not say that when a prisoner shall be convicted of two or more offences, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by any subsequent Act. The punishment of whipping is not one of the offences prescribed by the Penal Code, but it is a punishment prescribed by a subsequent Act in lieu of the punishment prescribed by the Penal Code, or in addition to it, as the case may be. The proviso in Section 41 of the Code of Criminal Procedure declares, that if the case be tried by a Magistrate, the punishment shall not, in the aggregate, exceed twice the extent of punishment which such Magistrate, by his ordinary jurisdiction, is competent to inflict. The ordinary jurisdiction of a Magistrate with full powers is defined in Section 22, *viz.*, imprisonment not exceeding two years, or fine to the extent of one thousand rupees, or both. If whipping be awarded in lieu of, or in addition to, any of the punishments provided by the Penal Code, the punishments for the several offences will, in the aggregate, exceed the extent of punishment which a Magistrate, by his ordinary jurisdiction, is competent to inflict.

Section 22 of the Code of Criminal Procedure is not intended to describe the punishment allotted to the several offences of which a man may be guilty, but merely the ordinary jurisdiction of the Magistrate. Take theft again as an example. Theft by the Penal Code is punishable with three years' imprisonment, or with fine, or with both. But the Magistrate of the District, or a Magistrate with full powers, cannot sentence the prisoner, if he convicts him of the offence of theft, to three years' imprisonment and fine without limit, because his jurisdiction is limited to two years' imprisonment, and a fine of one thousand rupees. The punishment to be awarded for the several offences is limited by the Sections of the Penal Code which provide the punishment for them.

I agree that under Act VI of 1864 sentence of whipping may be passed by an officer not inferior to a subordinate Magistrate of the first-class. The extent of whipping to which a Magistrate may sentence is not limited, except by Section 10 of Act VI of 1864, which limits the amount of the punishment generally. It matters not whether whipping is imposed as a punishment by a Magistrate or by a Sessions Judge, each of them, if he can pass the sentence at all, can impose it to the full extent authorized by this Act.

Take theft as an exemple. Theft is one of the offences for which an offender may be punished with whipping in lieu of the punishment awarded by the Penal Code. The limit of the punishment is contained in Section 10 of the Act. In no case, if the cat-o'-nine tails be the instrument employed, shall the punishment of whipping exceed 150 lashes, or, if the

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rattan be employed, shall the punishment exceed thirty stripes. By the notification as to the mode in which the punishment of whipping is to be inflicted in Bengal, it is directed that the rattan shall be the instrument used; that the rattan shall not exceed half an inch in diameter. If a man is whipped with a rattan for one offence of theft, whether under the sentence of the Sessions Judge, or under the sentence of a Magistrate with full powers, he may have thirty stripes with a rattan not exceeding half an inch in diameter. If he is flogged for that offence with the cat-o'-nine tails in those parts of the country where that instrument is allowed to be used, he may have as many as 150 lashes. It cannot be supposed that it was ever intended that if a man should be convicted of two offences at the same time, he should be subject to 150 lashes with a cat-o'-nine tails for each offence amounting to 300 lashes altogether, or to thirty stripes with a rattan half an inch in diameter for each offence, amounting, in the aggregate, to sixty stripes with such an instrument. If a man is convicted of a theft to-day by a Magistrate of a District, he may be sentenced to thirty stripes with the rattan. If that same man commits another offence, and is convicted by the Magistrate of that second offence six months hence, he can have thirty stripes with a rattan for that second offence. The jurisdiction of the Magistrate as regards whipping for those two offences is limited to thirty stripes for each, or sixty stripes in the whole. If the Magistrate convicts the offender of two thefts at the same time, is he to be allowed to twice the extent of the punishment which he could give for one of them? When the Legislature, in 1861, enacted by the Code of Criminal Procedure that if a Magistrate should convict a prisoner of two offences at the same time, he should have power to sentence the offender to the several penalties prescribed by the Penal Code for the said offences; provided that he should not sentence to any imprisonment exceeding, in the aggregate, twice the extent of punishment which such Magistrate was, by his ordinary jurisdiction, competent to inflict; they knew what they were about. They knew what the punishments prescribed by the Penal Code were, and they knew that a Magistrate had not, by his ordinary jurisdiction, power to inflict more than two years' imprisonment with a fine not exceeding one thousand rupees. They would have taken an unjustifiable leap in the dark in dealing with the subject of punishments, if they had extended the same power with respect to any new punishment, which any succeeding legislative body might think it justifiable to impose.

Section 46 of the Code of Criminal Procedure must be construed strictly, and limited to the penalties prescribed by the Penal Code, and to the ordinary jurisdiction of the Magistrate as defined by Section 22 of the Code of Criminal Procedure. The Legislature, at the time when the Code of Criminal Procedure was passed, never intended, by Section 46, to legislate beyond what they could foresee, and to give powers the result of which must have been unknown to them. The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two offences of which an offender might be convicted at the same time. At the time when the Code of Criminal Procedure was passed, the punishment of whipping did not exist. There is nothing in the Code of Criminal Procedure, or in Act VI of 1864, from which the Legislature can be presumed to have intended that if a man should be convicted of two thefts at the same time, he might be sentenced to stripes for the one, and to imprisonment and fine for the other. The limitation in Section 46 could not have that effect; it is limited to twice the amount of punishment prescribed by the Penal Code which the Magistrate can inflict according to his ordinary jurisdiction. If it be held that he can punish for one offence with stripes, when he punishes for both, I see no mode by which we can escape from holding that he may punish for each by whipping. He has not, as it appears to me, the power of sentencing to whipping in lieu of imprisonment for each, and I do not see how he can have the power of sentencing to it in either. I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences

at the same time. The object of Section 2 in giving whipping in lieu of any other punishment, appears to have been to avoid the crowding of jails, and the contamination to which offenders might be subjected by being inmates of jails. But this object would be frustrated if, in the case of an offender being convicted of three thefts, he might have two years' imprisonment, and a fine for one, and stripes to the extent of thirty with a rattan half an inch in diameter for each of the others of which he might be convicted.

Looking to the words of the several Acts, and construing them according to the ordinary rules of interpretation, I am of opinion that if a Magistrate proceeds under Section 46 of the Code of Criminal Procedure, he must confine his sentences strictly within its provisions If he proceeds under Act VI of 1864 in the case of a conviction for two offences at the same time, he must be guided by that Act only, and cannot sentence the offender for more than one of the offences.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of giving false evidence.

6th April.

Queen *versus* Pora Nashyo.

Before *Peacock*, C. J , and *Macpherson* and *Glover*, J J.

Depositions taken before the Magistrate must be formally proved in the Sessions Court. As the law stands, even where the prosecution has failed to establish a complete case, conviction may follow on what accused says in his defence before the Sessions Court.

Macpherson, J.—The prisoner in this case has been tried under Section 193 of the Penal Code for giving false evidence before the Officiating Joint Magistrate, the charge being that he, on the 30th September last, stated "this man Bhattri is the man who was applying the torch." The prisoner was found guilty, and sentenced to one year's imprisonment.

The nature of the evidence against the prisoner is thus stated by the Sessions Judge:—"The case against the prisoner rests more on the glaring improbabilities of his own statements, and the gross prevarications that he uttered, than on the evidence of the witnesses for the prosecution. This only proves that the man Bhattri, the subject of the prisoner's statement, as embodied in the charge, was aiding in putting out the fire in the prisoner's house, and that the latter made no accusation against him at the time; and although the prisoner attributed the fire to incendiaries, he said he did not know who they were. The Court would hardly have convicted the prisoner on this evidence alone, but, coupled with his statements, made both in the Foujdaree and Sessions Court, such a tissue of contradictions cropped out as to afford the strongest presumption that he intentionally gave false evidence. It is not improbable, as suggested by the Joint Magistrate in his grounds of commitment, that the man Bhattri took advantage of the fire in the prisoner's house to lay his hands on some of his property,—a very common practice at an occurrence of this sort. Hence the prisoner's motive for accusing him of the much more serious offence specified in the charge. The Court, however, is inclined, to deal leniently with the prisoner, as he appears to be more fool than knave," &c.

There is, as the Sessions Judge says, in fact, no evidence against the prisoner, excepting the statements made by the witnesses who were examined, and the statements made by the prisoner himself when before the committing Magistrate, and subsequently in the Sessions Court.

The first question is, whether there is upon the record any legal evidence that the prisoner ever made before the Joint Magistrate the statement which is the basis of the prosecution. The witnesses for the prosecution only say that on the night of the fire the prisoner never accused Bhattri of having caused it, but, on the contrary, said he did not know who caused it, except that it was caused by thieves. There is no proof whatever put in on behalf of the prosecution that the prisoner ever was examined at all before the Joint Magistrate on the 30th September last, much less that he made the statement in respect of which he is charged with the offence of giving false evidence.

I find, amongst the papers sent up with the case (but not annexed to the

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Sessions Judge's record of the trial before the Sessions Court) a document, marked A, which, on the face of it, purports to be the deposition given by one Pora in a case against Bhattri and others pending in the Joint Magistrate's Court. But that document is not in evidence in this case, because there is nothing to show what it is. If it were intended to rely upon it as proving the statement which the prisoner made before the Joint Magistrate on the 30th September, it was necessary to prove that the deposition is what it purports to be, and to prove that the prisoner is the identical Pora who was examined by the Joint Magistrate on the 30th September, and that it is his evidence of which the document (A) purports to be the record. The deposition of a witness taken in a criminal proceeding in one Court can be used in evidence in another criminal proceeding in a different Court, only if it is proved to be that which it purports to be. The handwriting and signature of a Magistrate do not prove themselves in such a case; they must be proved in the ordinary manner. But it is said that the fact that the prisoner made in the Joint Magistrate's Court the statement with which he is charged is sufficiently proved by what the prisoner himself said in the Sessions Court.

The prisoner being put upon his trial pleaded *not guilty*. It would appear from the Sessions Judge's record of the trial that the course pursued was this:—*first*, the witnesses for the prosecution were examined; *secondly*, the witnesses for the defence were examined; *thirdly* the prisoner made his defence; and *fourthly* the Court, under Section 373 of the Criminal Procedure Code, put certain questions to the accused.

The prisoner's defence (which it was highly irregular not to take before the witnesses for the defence were examined) is recorded by the Sessions Judge as connected with, and immediately preceding, the prisoner's examination by the Court It is recorded thus:—" *Defence.*—I did say to the Joint Magistrate that Bhattri was the man who was applying the torch to my house. It is true I saw him do it. I did not accuse him at the time, as I was *behosh.*"

By the Court.—When I saw Bhattri in the act, I called out 'See Bhattri is setting fire to my house;' he then ran away; he came back again to help in putting out the fire with several others. I then said before all these 'This Bhattri set fire to my house.'

N. B.—Is asked why he said above, and before the Joint Magistrate, that he had not accused Bhattri at the time. Prisoner makes no other answer than that he was *behosh.*

My property was stolen before the house was fired. There was no one else but Bhattri.

Is asked why he accused two other persons, namely, Jallal and Banu.

Says his neighbours told him they had also probably done it.

N. B.—In his deposition alluded to above, it will be seen the prisoner says he accused Banu because he is a son-in-law of Bhattri, and Jallal because he is a relation of Banu.

" The prisoner is the most provoking fool I have ever seen. In the course of the above examination, he has contradicted himself again and again, even to the extent of saying that he did not see Bhattri setting fire to his house; and it is with the utmost difficulty that I have been able to make an intelligible record of his statement." Such is the record of the defence made by the prisoner, and of his examination by the Court.

The prosecution having failed to prove that the prisoner made before the Joint Magistrate the statement with which he was charged, can what the prisoner said in making his defence, and when interrogated under Section 373, be used to prove that he did make that statement?

It appeared to me at first that it could not be so used, because, as the prosecution had not laid before the Court a complete case, the Court ought to have acquitted the prisoner without calling upon him for his defence. But on further consideration, I think that it can be so used: for it seems to be impossible to construe Sections 372 and 373, so as to limit their application to cases in which a *primâ facie* case for the prosecution has been made out.

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Although there is no doubt of the prisoner's guilt, I cannot help regretting that the conviction should have been obtained as it has been, when there was, in fact, no difficulty in proving the case for the Crown in the ordinary manner if the prosecution had been properly conducted.

The Judge, in one part of the proceedings, says (expressing himself in highly unjudicial language) that the prisoner is the most provoking fool he ever saw, and that it was with the utmost difficulty he was able to make an intelligible record of his statements. Again, in his judgment, he says that the prisoner appears to be more fool than knave. Yet the case is not proved in the ordinary manner as it might and ought to have been, and the prisoner is convicted on evidence which would have been insufficient if it had not been supplemented by statements made by the prisoner to the Sessions Court, without his having apparently ever been told by the Court that he was not bound to say any thing unless he pleased.

Although the manner in which this case was tried is, in my opinion, very unsatisfactory for the reasons I have given, I do not think the conviction is contrary to law, and therefore I think that the appeal should be dismissed.

Peacock, C. J.—I concur entirely in the view of the law which has been taken by Mr. Justice Macpherson, and generally in the remarks which he has made.

I entertain no doubt as to the prisoner's guilt.

The only point upon which proof was wanting when the prisoner was called upon for his defence, was that he had made the charge.

Upon that point the evidence was supplied by the statement made by the prisoner in his defence, for he said "I did say to the Joint Magistate that Bhattri was a man who was applying the torch to my house."

It appears clear from the Magistrate's remarks, recorded in the calendar of commitment, that the charge was made by the prisoner. He says:—"The accused made a deliberate statement before me that he had seen the man Bhattri applying the torch to the roof."

It is very unsatisfactory that direct evidence was not sent up to prove the fact, and that the irregularity in sending up the case for trial was such that the prisoner, though guilty, might have been acquitted, but for the statement which he himself made in his own defence. It is also unsatisfactory that the Judge did not send for the requisite evidence before he called upon the prisoner for his defence. If there was no other evidence to prove that the prisoner did make the deliberate statement referred to by the Magistrate in the grounds of commitment, the Magistrate ought himself to have attended as a witness The mohurrir, who wrote the depositions, would, however, in all probability, have been able to prove the fact. I cannot help observing upon some of the remarks made by the Sessions Judge. He says:—"The prisoner is the most provoking fool I ever saw." And again:—"The prisoner is more fool than knave."

Such is not the calm and dignified language which ought to be used by a Judge, and the latter expression was one which, if really believed by the Judge almost called for an acquittal.

Glover, J.—I am of the same opinion, and have nothing to add to the judgment of the Chief Justice and of Mr. Justice Macpherson.

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A Sessions Judge has no power on the appeal of a complainant to interfere with the order of a Magistrate making over certain property found by the Police to the accused in whose house it had been discovered.

Miscellaneous Case of Shib Chunder Rai.

Before *Kemp* and *E. Jackson*, J. J.

Kemp, J.—This is an application to set aside the order of the Sessions Judge of the 24-Pergunnahs, altering the decision of the Deputy Magistrate of the same district.

The Deputy Magistrate had made over to the applicant Rs. 188-2 annas, which had been discovered in his house under most suspicious circumstances, but which, in the opinion of the Deputy Magistrate, the prosecutor had failed to prove to be a portion of the property stolen from him.

The Sessions Judge, on appeal by the prosecutor, reversed so much of the decision of the Deputy Magistrate as directed the restoration of the rupees to the applicant, who was the accused in the Court below, and upheld the conviction for abetting the theft of certain ornaments.

The Judge had, in my opinion, no jurisdiction to reverse, alter, or amend the Deputy Magistrate's order on appeal. Right or wrong, the Deputy Magistrate had found that there was not sufficient evidence that the money belonged to the prosecutor, and he ordered it to be restored to the accused. In directing it to be again taken from the accused, and made over to the prosecutor, the Sessions Judge acted without jurisdiction, and I would reverse his order and direct that the money remain with the accused, to whom after trial it was made over by the Deputy Magistrate. I express no opinion upon the propriety of the Deputy Magistrate's order in respect to the disposal of the money, as this Court, sitting as a Court of Revision, has no jurisdiction to do so, the Deputy Magistrate having found, on the evidence, that there was no proof that the money belonged to the prosecutor, such finding being a question of fact and not of law.

Jackson, J.—I concur. The Sessions Judge had clearly no jurisdiction to entertain any appeal on the part of the complainant. The decision of the Deputy Magistrate being on a question of fact, and not of law, is not open to revision. The Deputy Magistrate's order must be carried out, though I agree with the Sessions Judge that the result of the Deputy Magistrate's order is a great failure of justice.

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Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan on a charge of giving false evidence.

Queen *versus* Kartick Chunder Halder and Shiboo Pershad Haldar.

Before *Kemp* and *E. Jackson*, J. J.

A Civil Court, sanctioning a criminal prosecution for giving false evidence, must distinctly state the exact words upon which the prosecution is based, and must not sanction such proceedings generally.

An application to have a civil suit, which was decreed *ex-parte*, re-heard, need not be verified, and no prosecution, as for giving false evidence, will lie, because such an application containing false statements was actually verified.

An award of part

Jackson, J.—These prisoners were tried by the Sessions Judge of Burdwan and a jury, and convicted of the offence of giving false evidence under Section 193 Penal Code, and sentenced to three years' rigorous imprisonment, and to pay a fine of Rupees 100 each, to be levied by distress and sale; and out of the amount thus realized Rupees 50 were directed to be made over to the first witness, Purtab Chunder Dutt as compensation for the loss he had been put to by the false objections raised by the prisoners.

The proceedings arose out of a civil suit in the Court of the Sudder Ameen of Burdwan, Mr. Wright.

Purtab Chunder Dutt, on the 15th February, 1865, brought a suit against Kartick Chunder Haldar and Shiboopershad Haldar to recover Rupees 200 principal, and Rupees 95 interest, which he stated to be due to him from them.

He filed no bond or document of any sort in support of his claim.

On the same day the defendants are said to have appeared in Court and to have filed a ruffanama, admitting the claim of the plaintiff, and upon the same day the Sudder Ameen recorded a decree against them. It is stated that this form of action is customary in the Sudder Ameen's Court in

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of a fine to the prosecutor cannot be made, unless there is proof that he suffered loss.

Burdwan. The parties having agreed beforehand that in order to save limitation, a decree shall pass and go to the Court, the plaintiff files his claim, the defendant his admission of its correctness, and a decree thereupon passes. As, however, there seems to be some impression that decrees may thereby be obtained by false personation of defendants, the rule is, that on all such occasions a descriptive roll of the defendants shall be prepared by an officer of the Court, and recorded on the admission of the defendants. This was done as respects the defendants in this case.

Subsequently on the 25th January, 1867, Purtab Chunder Dutt took out execution of this decree, and after notice was served on the defendants, and no objection was preferred by them, execution issued, and certain property was attached. Objections were raised to the attachment on sale of this property by Goluk Chunder Dutt, the brother of the defendants; but these were overruled on the 27th May. On the 30th May the defendants appeared in Court, and applied to be heard in defence of the suit, alleging that they had not been aware of the institution of the suit, and that they had filed no ruffanama, and owed the plaintiff no money; and further stating that the false action had been brought about by the machinations of a vakeel of the Court, Kalee Churn Dutt, since deceased, who had been at enmity with them. An enquiry was made upon this application, and the Sudder Ameen then presiding in the Court finding that the description of the defendants as recorded on the back of the admission of judgment tallied with that of the defendants, rejected their allegations as false. The defendants appealed to the Judge, but he dismissed their appeal. Purtab Chunder Dutt then applied to the Judge to sanction a prosecution under Section 193 of the Penal Code against the defendants on charges of the offence of having given false evidence, and of having verified as true a false statement in their application to the Sudder Ameen. The Judge's order upon this petition is in the following words, *viz.*, "the applicant may, if he chooses, prosecute in the Fouzdaree, this Court seeing no ground on which to prohibit him from doing so." Thereupon Purtab Chunder Dutt brought a complaint before the Magistrate, who committed the prisoners, and the result was their conviction. The Magistrate's charge against the prisoners is recorded in the following words:—"That there is hereby made against Kartick Chunder Haldar and Shiboopershad Haldar the charge that they being bound by an express provision of law, *viz.*, Sections 24, 123, Act VIII, 1859, to state the truth, did on or about the 23rd day of May, 1867, at Burdwan, present to the Sudder Ameen a verified statement, setting forth—

First.—"That in a suit instituted against them on the 15th February; 1865 by one Purtab Chunder Dutt in the Sudder Ameen's Court, they did not present a written confession of judgment.

Second.—"That the signatures appended to the holiya or descriptive roll endorsed on the written confession of judgment filed in the aforesaid case, are not their signatures.

Third.—That they never received any intimation of a notice served upon them under Section 216, Act VIII of 1859, in execution of a decree obtained by the plaintiff on confession in the aforesaid case:—

"That these statements are false, and that in making them they have intentionally given false evidence in a stage of a judicial proceeding, and that they have thereby committed an offence punishable under Section 193 of the Indian Penal Code, and within the cognizance of the Court of Session."

It is not quite certain whether the Sessions Judge amended this charge; but upon the calendar of commitment there is a note in the handwriting of the Judge as if he had amended it, and the charge he proceeded to try was for giving false evidence, "*i. e.*, that they have stated, in a written statement duly verified, *first*, that they did not know of the institution of the case in the Sudder Ameen's Court, and that they did not put in a confession of judgment, also that the execution notice was served secretly, and that they had only received intimation of execution four days before the date of petition." The

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Sessions Judge's alteration of the charge is not alluded to in his proceedings The cause of the alteration is not recorded; but it is evident that the words upon which the Magistrate grounded his charge are not the exact words used in the application of the defendants, and the second clause of his charge is not to be found in the application at all; whereas the words stated in the charge, as framed by the Sessions Judge, are those in the application.

The evidence offered at the trial consists of the depositions of Purtab Chunder Dutt and of his brother Goluck Chunder Dutt. The first deposed that the prisoner filed a confession of judgment, and the second that he pointed out the prisoner Kartick Chunder Haldar to the peon who went to serve upon him the notice of execution of the decree having been taken out. There is also the evidence of Koelash Chunder Banerjee, the mohurrir, who wrote the descriptive roll of the defendants in the Sudder Ameen's Court, who, however, admits that he cannot recognise the prisoners as those defendants, and of Sonaullah Sheikh the peon who served the notice, and who deposes that Goluk Chunder Dutt pointed out Kartick Chunder Haldar, and he signed the notice, though he is not asked whether he recognises him to be the same, or how he is satisfied on the point. The question should have been put, as a peada who serves a notice, as a general rule, would not be able to recognise the person on whom he served it three years after the occurrence, unless he had some previous acquaintance with the person so served. The prisoners before the Magistrate, and in their defence before the Sessions, denied their guilt, and asserted that they did not give in the ruffanama, and were not aware of the suit having been brought.

The following is the Judge's charge to the jury :—

"The prisoners are charged jointly with having made in a written statement filed in the Court of the Sudder Ameen two false statements,—one to the effect that they had not been aware of a institution of a suit against them by the first witness in 1865, and that they did not file a confession of judgment in the said case, likewise that they were not aware of the issue of notice of issue of process of execution which is said to have been served in 1273.

"The evidence relied on to prove the falsity of the first statement is that of the first witness, who was the plaintiff in the original suit, and he has stated on oath that the two defendants did, in person, file the confession of judgment, and that they went to Court in his company for that purpose. *Secondly*, there is the evidence of the mohurrir who wrote the description of the two men who filed the confession of judgment, which he declares he wrote after carefully examining the persons of those parties. This description is written on the back of the kabooljawab. As circumstantial evidence, there is the description of the two men who filed the confession which has been read before you, and which you are able to compare with the appearance of the defendants who are before you. *Secondly*. There are the signatures on the several papers connected with the case, one of which at least, namely, the verified petition for review, is admittedly signed by the defendants, and also certain signatures written by them in the presence of the Sudder Ameen, and by his orders. After comparing these signatures, and the description of the parties who filed the confession of judgment, you will consider whether there is any cause for distrusting the evidence of the first witness, although he was plaintiff in the case in which the confession of judgment was filed.

Secondly, you will decide whether the second statement has been proved to be false by the deposition of the peon Sonaoollah, and that of the last witness, and whether you are satisfied that Kartick Chunder did personally receive the notice of execution, and sign it with his own hand. If this is proved, it cannot be true that that defendant was unaware of execution having been taken out till four days before the said petition was put in, the receipt to the notice having been signed in Maugh, 1273, or February, 1847, while the petition which contains the statement said to be false was put in on the 30th May, 1867. The petition was a written statement of the defendant's objection

to the plaintiff's claim, and was such a statement as required to be verified; and if the defendants have in that petition stated anything that was untrue, they are liable to the penalty of perjury on account of such statements.

"You are only to decide whether those two statements noted above are true or false, and whether they were made, if false, with a fraudulent motive."

It seems to me that from first to last the proceedings of the Courts, both Civil and Criminal, have been illegal. It is not perhaps my duty, in considering the appeal of the prisoners from the conviction and sentence in a criminal trial, to animadvert upon the mode of procedure adopted by the Sudder Ameen in trying such undefended civil actions as these. I am inclined to think that the procedure is not according to Act VIII of 1859. It is certain, however, that the summary procedure adopted may lead to false suits; and it was, I think, incumbent on the Sudder Ameen, when it was stated before him that such a false suit had been brought, to investigate it thoroughly, and I think the Judge also should, on appeal, have seen that the whole of the circumstances were thoroughly enquired into. There were facts, however, which made the story of the prisoners improbable, unless some explanation was given of those facts, and on these facts the civil officers may have had ground for arriving at the conclusion they did.

In sanctioning proceedings being taken in the Criminal Court by Purtab Chunder Dutt, the Judge seems to have acted illegally in not having distinctly recorded the exact points upon which he sanctioned such proceedings. If he merely gives a general sanction to a prosecution for giving false evidence, and for false verification, without pointing out the exact words upon which the prosecution is based, such prosecution may proceed upon statements made by the accused different from those which the Judge held to be false. The Judge should point out the exact offence which he thinks the Magistrate should take notice of and investigate. I do not think that the prisoner was prejudiced by the omission in this case.

The first question which arises on the fact of the offence having been committed is, whether the verification of the application made in the Civil Court by the prisoners, even if proved to be false, subjects the accused to punishment for the offence of giving false evidence. Section 24, Act VIII of 1859 rules, that "if any plaint, written statement, or declaration in writing required by this Act to be verified, shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the provision of the law for the time being in force for the punishment of giving or fabricating false evidence." Is there, then, any Section of Act VIII of 1859 which requires that such an application as this shall be verified. Both the Magistrate and the Sessions Judge consider the application to be, in fact, a written statement under Section 120. But it appears to me that this is erroneous. It is more properly an application to have the suit reheard, on the ground that the decree was pronounced in their absence, and so far *ex-parte*. It would therefore be an application under Section 119, Act VIII of 1859, and that Section does not exact that such applications shall be verified. The whole prosecution, therefore, upon this one point must fall to the ground.

There are, however, numerous other irregularities in the course of the trial, and especially in the charge to the jury. The different documents which were placed before the jury were not in any way proved. The ruffanamah, or confession of judgment, was not proved to have been put in by the accused. Purtab Chunder Dutt deposes that they put in a confession of judgment; but he is not required to identify it. The notice issued on the accused of the execution of the decree, and the signature of Kartick Chunder Haldar upon the receipt for such notice, were similarly not identified. Goluck Chunder Dutt deposed that Kartick Chunder Haldar did sign such a receipt to such a notice, but the paper was not put into his hands for identification. The application on which the false verification is charged to have

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been made was not proved to have been put in by the accused as it should have been. The signatures on other papers by the accused, which, it is said they admitted, and which were put before the jury for the purpose of comparison, are not shown to have been admitted on the Sessions trial. The defence of the accused before the Magistrate or in the Sessions Court contains no such admission. All such papers should be clearly proved before they are submitted to the jury as evidence in the case. Some person who was present and saw the accused write their signatures before the Sudder Ameen should have been called to attest those signatures before the jury was allowed to draw any comparison from them. The Magistrate might have examined the accused regarding these signatures; and if they had then admitted that these were their signatures so recorded, such admission might have been taken as evidence. All these papers which were relied on for the prosecution as evidence on the Sessions trial should be placed upon the record of the trial. They are to be found scattered through different records. Some are in the Civil Court records; some again in the Magistrate's record.

Upon the facts of the case, and looking now only to the facts proved at the Sessions trial, it seems to me that the conviction of the accused could not be sustained on such facts. The only witnesses who really give any evidence against the accused are Purtab Chunder Dutt and his brother Goluck Chunder Dutt. These are the very persons whom the accused charge with having fraudulently brought the false charge against them. The whole question at issue was whether they committed the fraud, and secured persons to personate the accused, or whether the accused committed the fraud in afterwards denying what they had done. In deciding between the two, some additional evidence was necessary. There is the deposition of the mohurrir of the Sudder Ameen's Court, but he cannot recognise the accused, and though he states he wrote down the description of them, he is not required to identify that paper; and he admits that he wrote that paper not in open Court before the Sudder Ameen, but in the sherishta. If then this man could be gained over to write, not a description of the parties actually before him, but such a description as the plaintiff wished, the opportunities to a plaintiff to commit such a fraud as the accused charge Purtab Chunder Dutt with having committed are greatly increased; and it is to be recollected that the accused have all along stated that a vakeel of the Court was at the bottom of the whole proceeding. There is nothing on the record to show whether Purtab Chunder Dutt, and the accused were even acquainted with each other before this case was put into Court. There remains only the evidence of Sonaulla Peada; and, as I have before stated, his evidence is good solely if he had previous acquaintance with Kirtick Chunder Haldar; and no question was put to ascertain this. If he had not previous acquaintance with Kartick Chunder Haldar, his evidence is of very little weight in deciding on the guilt of the accused.

The further evidence from comparison of signatures also falls to the ground, as those signatures are neither proved nor admitted.

There were other circumstances which came out in the civil proceedings, but which are not alluded to on the Sessions trial, which make it probable that the accused were acquainted with the circumstances of this suit having been brought against them. It is impossible for me to give any opinion as to whether the accused are guilty or not. Without much more enquiry than any officer, civil or criminal, has yet made, I could not hazard an opinion upon the point. This being a trial by a jury, the sole point before me is whether the proceedings have been conducted legally, and whether the evidence in law bears out the prisoner's offence. For the reasons I have already given, I think that the proceedings have been illegal in numerous points. I would therefore reverse the conviction, and discharge the accused.

I would add that the order directing Rupees 50 to be paid to Purtab Chunder Dutt is also illegal. There is no proof on the record that he has suffered any loss owing to the conduct of the accused.

Kemp, J —I concur in directing the discharge of the prisoners

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Miscellaneous Case of Chunder Kant Chuckerbutty, appealing against the order of the Sessions Judge of East Burdwan, affirming that of the Joint Magistrate, sentencing him to rigorous imprisonment for a month on a conviction of obstructing service of warrant.

Before *Loch* and *Glover*, J. J.

A Civil Court must itself, under Section 25, Regulation IV, 1793, punish a simple resistance of its process, and not make the case over to the Magistrate.

This is a case of resistance of process of the Civil Court, and is punishable by the Court under the provisions of Section 25, Regulation IV of 1793. This Section, with the two previous Sections, 22 and 23, of the same law, were not repealed by Act X of 1861, nor was Regulation IX of 1799, which made some modification in the above Sections. Nor have the above Sections of Regulation IV of 1793 been rescinded by the repealing Act VIII of 1868 It is clear, therefore, that the Civil Courts are still empowered to punish resistance of their processes without reference to the Magistrate, and the Principal Sudder Ameen should, we think, have followed this course in the present instance. So long as Section 25, Regulation IV of 1793, is in force, the Civil Court should exercise the jurisdiction vested in it by law, and cannot make over a case of simple resistance to its process to the Magistrate for trial. We therefore reverse the orders of the Criminal Courts passed in this case.

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Miscellaneous Case of Doorga Churn Giree, appealing against the order of the Sessions Judge of Midnapore, confirming that of the Deputy Magistrate, imposing on him a fine of Rs. 300 finding him guilty under Section 3, Act XXIX of 1867.

Before *Loch* and *Glover*, J. J.

A party once fined for not taking out a license cannot be again fined for persisting in not taking it out.

We do not think, as pleaded by the vakeel for the petitioner, that the punishment in this case was a second punishment for the same offence. The punishment now inflicted was for a second act of disobedience to the orders of the Collector, requiring the petitioner to take out a license. Looking, however, to the wording of Section 3, Act XXIX of 1867, amending Section 15, Act XXI of 1867, we think that it was not the intention of the Legislature that a party once fined should again be liable to fine for not taking out a licence. Indeed, if we might interpret that Section by Section 17 of Act IX of 1868, there can be no doubt as to the intention of the Legislature, that if the fine levied equalled or exceeded the license tax, no further demand was to be made on the party fined. Section 3 of Act XXIX of 1867 provided for the realization of the full amount of the tax by directing that the penalty imposed by the Magistrate should not be less than the sum mentioned in the notice, and from these words we gather that if a fine equal to the license tax demanded were once paid in the shape of penalty, no further demand for the tax was intended to be made against the same individual. Under this view of the case, we reverse the order passed by the Magistrate and Sessions Judge.

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PRIVY COUNCIL DECISIONS.

Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Baboo Beerpertab Sahee v. *Maharajah Rajenderpertab Sahee, and Cross-Appeal from the High Court of Judicature at Fort William, in Bengal; delivered March 4th,* 1868.

Before Lord *Cairns*, Sir *James W. Colvile*, Sir *Edward Vaughan Williams* and Sir *Richard T. Kindersley*.

1. A nuncupative will must be proved in the clearest possible manner.

2. The East India Company having confiscated an estate of a rebel before the permanent settlement, and appropriated its whole revenues, had full power to confer it on whom they pleased, and on what terms they pleased. They were not bound by any provisions of Mahomedan law as to rebels' estates. Their grantee, whether a relative of the former owner or not, received the estate, not as ancestral, but as self-acquired property. But where the estate had been an impartible raj, descendible entire to the eldest heir male, in the absence of anything showing a contrary intention on the part of the grantor, it might be held that the old incidents attached to the estate in the hands of its new owner. The fact that the title of Raja was not conferred for some years after would not affect the nature of the tenure. Nor can Regulation XI of 1793 affect a grant of 1790.

3. The question of whether, under Mitakshara, a father can by will make an unequal division of self-acquired immoveable property cannot arise where the estate is an impartible raj. In such an estate, sons other than the eldest have no inchoate right.

The subject of this appeal is the right of succession to the very considerable estate of the late Maharajah Chutterdharee Sahee, who died at Hutwah in Zillah Sarun, on the 16th of March, 1858. He was the owner of a large zemindary called Hunsapore, which had been in the family of which he was a member for many generations before the East India Company, under the grant of the Dewanny in 1765, became the virtual rulers of Bengal, Behar, and Orissa. Like some other extensive zemindaries in Behar, it was during that period an impartible Raj, and by family custom descended, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance, called babooana. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal. The Rajah in possession of the property, when the East India Company assumed the government of the province, was one Futteh Sahee. In consequence of his refusal to acknowledge the sovereign or quasi sovereign rights of the Company, or to pay revenue to them, a contest ensued; and about the end of 1767, he had been driven from Hunsapore by the Company's troops into the jungles dividing their territories from Goruckpore, which then formed part of the dominions of the Nawab Vizier of Oudh.

The East India Company thereupon attached the estate of Hunsapore, and let it out to farmers. Futteh Sahee, however, from his retreat in the jungles, or in the dominions of the Nawab Vizier, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed Govindram, one of the farmers under the Company. Soon after that occurrence there was a sort of Treaty of Peace between him and the Company's Government; he was permitted to return to Hunsapore, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the province, and renewed his predatory life on its borders. And in May 1775 he attacked and murdered his own cousin, Bissunt Sahee, the grandfather of Chutterdharee Sahee, who was then the renter or farmer of Hunsapore under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its officers during their possession of the estate. For the present, it is sufficient to state that the Company retained possession of it from the date of the first expulsion of Futteh Sahee until 1790, either making the collections by their own officers or letting it out to farmers; but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the decennial settlement was in contemplation or in the course of being made, the Government of Lord Cornwallis granted the property to Chutterdharee Sahee, then a minor, under circumstances which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837 the title of Maharajah was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other zemindars.

The pedigree at p. 2 of the appellant's case (the correctness of which is not disputed) shows that the late Maharajah had two sons who pre-deceased him. The elder of them (Ram Sahee) left two sons, *viz.*, Oogurpertaub and

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Deoraj, and the other (Pritipal Sahee) also left two sons, *viz.*, Tillukdharee and Beerpertaub (the Appellant.) These four grandsons were living at the time of the Maharajah's death, and were his co-heirs according to the ordinary Hindoo law of inheritance. Oogurpertaub is the father of the respondent, the Maharajah Rajender Pertaub Sahee. Upon the death of the Maharajah Chutterdharee, a contest arose as to the succession to his estate; Deoraj, Tilluk, and the appellant, insisting that it descended as *ab intestato* to his four grandsons in equal shares, according to the ordinary course of the Hindoo law; the respondent setting up the exclusive title which will be next stated, and Oogurpertaub favoring the pretensions of his son, and relinquishing his own rights in his favor.

The title set up by the respondent is shortly as follows:—

The late Maharajah had for several years before his death expressed his desire that his estate should descend, as the Raj of Hunsapore had up to the time of Futteh Sahee descended, to a single heir; and that the respondent, in whose favor his father had waived whatever rights he, as the eldest male descendant of the Maharajah, might possess, should be that heir. Accordingly, on the 15th of March, being the day before his death, the Maharajah made, in the presence of some members of his family, including the appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (tusleem) of the Raj to the respondent. On the same day, he caused his servants to write out four *Urzees*, for the purpose of notifying this fact to the principal authorities in the district, *viz.*, the Magistrate, the Judge, the Collector, and the Commissioner. These are the documents at pp. 361, 364, 365, and 367 of the record. All these were directed to be forwarded to Chuprah, the Sudder or principal station of Zillah Sarun. Early the next morning, the Maharajah directed his servants to prepare a similar Urzee for transmission to the Deputy Magistrate, Mr. Lynch, who lived at Sewan, a place much nearer than Chuprah to the Maharajah's residence at Hutwah. Before this was done, Mr. Lynch, accompanied by Dr. Mac Donnell, the Sub-Deputy Opium Agent of the district, called to pay a visit at Hutwah. They had an interview with the Maharajah, who presented the respondent to them as his heir; recommended him to Mr. Lynch's protection; and told him that an Urzee to his address was in course of preparation and would be forwarded. That Urzee, which accordingly varies in form from the others by introducing the circumstance of this visit, is at p. 363 of the Record. Later in the day, the Maharajah gave what is called "Tilluck" to the respondent; and afterwards caused his servants to prepare the testamentary paper which is set out at p. 167 of the Record, which he executed. He died somewhat suddenly about 4 P. M. of the same day.

In these circumstances the respondent rests his title to succeed to the whole estate of his great grandfather, first, upon the several before-mentioned acts of the Maharajah, relying on the latest instrument as a will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative will in his favour. He contends, however, further that the Raj being impartible, and descendible by custom, according to the rule of primogeniture, he, by reason of this father's abdication in his favour, is entitled to it to the exclusion of the other members of the family, independently of any act of the late Maharajah. But he admits that in either case they are entitled to have Babooana allowances of a proper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late Maharajah by those summary proceedings, touching the fact or the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title. The respondent, on the 26th of March, instituted a proceeding, before the Collector, for the Mutation of Names, and this was opposed by the Appellant, and also by Tilluckdharee and Deoraj. The respondent also instituted a summary suit in the Judge's Court for a certificate, under Act XX, as to the whole estate of the late Maharajah, which was met by cross-suits of the same nature by the appellant,

Tilluckdharee, and Deoraj, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act XIX of 1841, for the appointment of a Curator. All these suits were decided in the Respondent's favour by the Judge on the 22nd of May, and his judgments were confirmed on appeal by the Sudder Court in the month of August 1858. (Appendix, pp. 370 to 374.) And on the 14th of June, 1858, the Collector, proceeding in part on the decision of the Judge in the last-mentioned suits, granted the mutation of names for which the Respondent had applied. (Appendix, p. 374.) That order was confirmed by the Collector on the 5th of August, and again by the Commissioner on the 8th October, 1858, (Appendix, p. 277.) The effect of these preliminary proceedings was to put the Respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the respondent for his Bahooana allowance. The appellant, however, and his brother Tilluckdharee, commenced the suit out of which this Appeal has arisen, on the 31st of December, 1858; but the latter, after the Decrees in the Respondent's favour had been made in it, also came to an arrangement touching his allowance, and abandoned the Appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the appellant alone and the respondent.

The appellant insists on his title as one of the co-heirs of the late Maharajah, according to the ordinary Hindoo Law He impeaches, as fraudulent fabrications in support of the respondent's title, the will, and the several Urzees or petitions alleged to have been sent by the Maharajah's desire, and under his real, to the different Civil authorities of the district; and he denies that the alleged consignment or installation of the respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the Maharajah to make a will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the Raj of Hunsapore, according to family custom or otherwise, up to the time of Futteh Sahee, the law or custom determining that course of descent ceased on his expulsion; and that the grant to Chutterdharee was not one of an indivisible Raj descendible according to a special custom, but one of a mere Zemindary, governed by the ordinary law. In his case he further contended, that even had the grant been one of a Raj, or had the Raj continued in the line of Futteh Sahee, the special rule of succession would have been abrogated by the provisions of Regulation XI of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit, which are at p. 155 of the Record.

The judgment of the Zillah Judge, Mr. Wilkins, which was given on the 24th of April, 1860 (Appendix, p. 158), found that the family custom, according to which the estate was impartible, and descended to the eldest male heir subsisted at and up to the time of Futteh Sahee; that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to Chutterdharee; and that the estate was in his hands an impartible Raj, descendible to his next male heir alone, and, therefore on the renunciation of Oogurpertaub to the respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and on the above ground decreed in favour of the respondent He held, however, that the alleged consignment or transfer of the 15th of March, and the will, were not well proven. And he decreed an allowance of 2,000 rupees per mensem to each of the plaintiffs, *viz.*, the appellant and his brother.

The judgment of the High Court on appeal from this decree is at page 17 of the second Record, and is dated the 24th of April, 1863. That Court also held that the Raj was originally impartible, and descendible by custom to

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the eldest male heir alone; and that it did not lose this character on its restoration to Cahutterdharee. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice Levinge's separate note at page 26, this point is more fully argued. But the High Court differing therein from the Zillah Judge, affirmed the validity of the will. It also reduced the allowance to each of the plaintiffs to 1,000 rupees per mensem.

At the close of the argument for the appellant, their Lordships intimated that in their opinion the judgment of the High Court, touching the *factum* of the will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion.

That the disposition was in accordance, with the Maharajah's general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of Mr. Dampier (Appendix, page 392), Dr. Fleming (page 393), Mr. L. MacDonald and Mr. John Macleod (page 394), Mr. W. F. McDonnell (page 395), Mr. Tayler and Mr. R. Macleod (page 396), and Mr. Richardson (page 397), being all of them European gentlemen in the public service or otherwise of respectable station, is to the effect, that from 1851 up to the time of his death, the Maharajah continuously entertained and constantly expressed the desire to keep his property together as a Raj, and his intention to make the respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. Lynch and Dr. McDonnell (pages 393, 394, and 397). The general intention of the alleged testator in favour of the respondent, and his testable capacity, are therefore established. It is true that in the interview with Mr. Lynch and Dr. McDonnell the Maharajah did not express his intention to make a will. It is also true that to the *factum* of the will there is no testimony but that of his native servants and dependents. It is, however, most improbable that the Maharajah should have relied on what passed between him and the two European gentlemen, when none of his family except the respondent, and but few of his dependents, were present. And though he might also have relied on the Tusleem or consignation of the preceding day as the public expression of his wishes, and the formal installation of the respondent as the new Rajah (supposing that ceremony to have taken place), yet it must be recollected that the question whether the estate was impartible and descendible as a Raj was a doubtful one, and that he himself, as Mr. Dampier proves, had long known it to be so. There is therefore nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the respondent, he may, even after his interview with Mr. Lynch and McDonnell, have conceived and executed the intention of making a will, in order to supply by the force of that instrument any defects which his preceding acts may have left in the respondent's title. And if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the Maharajah, are utterly discredited by the evidence of Mr. Lynch and Dr. McDonnell; and it is not contradicted (as it might have been contradicted) by the oath of the appellant, whom the witnesses deposing to the Tusleem and to the execution of the will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing fortunately in number, of men who disregard this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains that there is no contradiction of the respondent's witnesses, except the testimony of witnesses, wholly

unworthy of belief, and that the probabilities are in favour of the truth of their story. Their Lordships must therefore hold, that the execution of the will has been proved; a conclusion which, though opposed to that of Mr. Wilkins, was also that of the Judge of First Instance, and of the Sudder Court when dealing with the same question in the summary suits under Act XX of 1841, as well as that of the High Court in this suit. This being so, we have in the will executed by the Rajah (Appendix, p. 167) a corroboration of the positive testimony as to the facts of the Tusleem or consignation, and of the execution and despatch of the Urzees, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached Chuprah. Nor do their Lordships see anything in the objection that the Tusleem and the execution of the will are inconsistent acts; that if the former took place, the Rajah had nothing to dispose of, and the will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the will was the crowning one, all being designed by the Maharajah to effectuate, so far as his acts legally could, his intention to leave his estate as a Raj, and to make the respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favour of the respondent by nuncupative will. They will only remark that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The respondent seems at one time to have relied on the Tusleem; at another on what passed between the Maharajah and Mr. Lynch as a nuncupative will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined the principal issues of fact on this appeal, their Lordships have now to consider whether the Maharajah had, by law, the power to make the will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the Raj of Hunsapore, is to be regulated, if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which Chutterdharee acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of Futteh Sahee.

It has already been stated, that after that event the property was for nearly twenty-three years held by the East India Company, who, whether they let it to farmers, or kept it under their own management, applied the whole of the surplus revenues to their own use. During great part of that period, Futteh Sahee continued to wage war with them from his retreat in the jungles, or in the territories of the Nawab Vizier, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of Bishunt Sahee took place, as before stated, in 1775. In 1778 the Revenue Council of Patna, on the application of Mohesh Dutt, the son of the murdered man, and the father of Chutterdharee Sahee, proposed that Futteh Sahee should be declared to have forfeited his zemindary, and that it should be bestowed on Mohesh Dutt, but the Government of Mr. Warren Hastings declined to comply with that proposal, or to do more at that time than hold out vague hopes of reward to Mohesh for his fidelity (Appendix p. 334.)

In 1784 the claims of Mohesh Dutt were again under the consideration of Mr. Hastings' Government. (The proceedings are set out in the Appendix pages 328 to 331). They clearly show that it was then considered that any

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grant to him, though he founded his claim on being the next heir to the zemindary after the extinction of Futteh Sahee's line, was matter not of right but of favour; and that it was actually proposed to insert in the Sunnud by which any such grant should be made, a condition for avoiding it in case the grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of Futteh Sahee within one year. Ultimately nothing was done on this application; Mohesh afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question, what should be done with it, came before the Government of Lord Cornwallis, in consequence of the steps which were then being taken in order to effect the decennial settlement. On the 16th of June in that year (page 237) the Collector, Mr. Montgomery having received instructions for the disposal of all lands, "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his district which answered that description, unless they were this zemindary and another somewhat similarly circumstanced. On the 21st of July the Board of Revenue submitted this letter to Government, with a recommendation that such part of Hunsapore as was the property of Futteh Sahee should be declared confiscated and sold, subject to the interests of the existing farmers. But on the 28th of July, the Government, in answer to this communication directed 'that such part of Hunsapore as was stated by the Collector to have been the real property of the rebel Futteh Sahee, should be conferred on the infant son of the late Mohesh Dutt after the usual publication had been made." That letter also provided that upon the lands being finally confirmed to the son of Mohesh Dutt, he should receive the allowance fixed for a disqualified landholder.

The Collector having on the 18th of November, 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to Chutterdharee Sahee," the Board of Revenue on the 17th of January, 1791, recommended that Chutterdharee Sahee, the infant son of Mohesh Dutt, should be "declared proprietor of the land in Hunsapore, which belonged to Futteh Sahee," and the Government on the 21st of January ordered accordingly.

These proceedings are at pages 237, 238, and 239 of the Appendix. A subsequent letter of the Board of the 29th of April 1791 (at page 324), fixes the Malikana allowance for the infant at 1,027 sicca rupees, 7 annas, 4 pies per mensem, and makes it payable from the 11th of October, 1790.

In October 1802, Chutterdharee having come of age, entered into a formal engagement for the payment of the Government Revenue; and the revenue officers who had managed the estate during his minority relinquished it to him and issued a proclamation directing the ryots and tenants to pay the collections to him. These documents, called respectively the Dowl and the Amuldustuck, are at pages 296 and 297, but they do not throw much light upon any of the questions raised in the suit.

It is material to observe, that during all these proceedings Futteh Sahee and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a Fukeer, having given up even his Gorruckpore property to his family (see page 321). In 1790, his wife and one of his sons appealed to Government for an allowance, but their application was rejected on the 25th of June in that year (page 324). In April 1792, one of the sons, and in April 1808 four of the sons, of Futteh Sahee made applications for the restoration of the estate and for allowances out of it. On the 29th of April, 1808, the latter application was rejected by Government in a letter which stated that "the estate of Futteh Sahee had been forfeited to Government" (see pages 320 to 323). Areemurdhun Sahee, one (and apparently the eldest) of the four, made similar claims by petition in 1816 (page 327), and again in 1821 (page 325). In both these petitions he stated that his younger brother had come forward before Mr. Montgomery in 1790, claiming, on behalf of Futteh Sahee's line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The order indorsed on the

petition of 1821 is to the effect that "whereas the property of Futteh Sahee was confiscated on account of rebellion," no further proceedings on the petition are necessary. In June 1829 the great grandson of Futteh Sahee (page 306) brought a regular suit against Chutterdharee and the Government for the recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Statute of Limitations. And the same persons seem to have appeared on the proceedings before the Collector of the 14th of June, 1848, which is above referred to, alleging that the grant to Chutterdharee was for life only, and again setting up his own title as the descendant and representative of Futteh Sahee.

On these facts, it is at least clear that there was a virtual confiscation of the interest of Futteh Sahee and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government had not only persistently treated the estate of Futteh Sahee as forfeited, and refused to recognize any claim on the part of his descendants; it had for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of Mohesh Dutt, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favour it finally conferred it on Chutterdharee.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice Levinge, have founded upon the supposed obligation of the East India Company to govern the provinces which they held under the Mogul Emperor by virtue of the grant of the Dewanny according to Mohammedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an arrangement might, perhaps, have been plausibly urged in the suit which the great grandson of Futteh Sahee brought against Chutterdharee and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under Chutterdharee; and as between them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and therefore the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of Chutterdharee. The fact that he was the member of the family which had so long held the estate, next in succession to the line of Futteh Sahee, and the son and grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the Shevagunga case (9 Moore I. A., 606)

The question remains what was the nature of the estate granted, whether it was a fresh grant of the family Raj with its customary rule of descent; or a grant of the lands formerly included in that Raj to be held as an ordinary zemindary.

There was not in this, as in the Shevagunga case, a new Sunnud We have no evidence of the intention of the grantors, except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings in the Council-room, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee. Again it cannot be denied that in these proceedings the term "Raj" is never used, or that in some of them the subject of the grant is spoken of as "the land in Hunsapore which belonged to Futteh Sahee."

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On the other hand, there is no expressed intention to alter the nature of the tenure. The estate whilst it was in the hands of the Company had never been broken up. The policy of the decennial settlement was to form a body of landholders, by ascertaining in whom the zemindary interest in the soil actually was, and making with those persons a permanent settlement of the Government Revenue, so as to give them greater fixity of tenure. Lord Cornwallis's Government determined to set up Chutterdharee as the zemindar with whom the settlement in respect of this property should be made. But the estate of a zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent Talookdars, or other under-tenants, ryots of various classes, and others; and the decennial settlement, as a reference to the Rules re-enacted by Regulation VIII of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed that the settlement was made precisely as it would have been made had the estate continued in the line of Futteh Sahee; and therefore that the subject conferred on Chutterdharee was the old zemindary with all its incidents, excepting, at most, its descendible quality. It seems to follow that the intention to alter that quality, if it existed would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favour of the hypothesis that the intention of Government was to restore the zemindary as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the the zemindary without the title of Rajah has been urged as a strong argument in favour of the appellant's view of the case. But that the title was not absolutely essential to the tenure of eth estate as a Raj is shown by the Tirhoot case, (6 Moore's I. A., p. 191; and in 1837 the title was conferred on Chutterdharee upon his application founded on the fact that it had been enjoyed by his predecessors, and annexed to the zemindary (Appendix, p. 308). This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which Chutterdharee then put upon the acts of their predecessors in 1790.

Another argument for the appellant is founded on Regulation XI of 1793. Mr. Field does not contend, in the face of the authorities cited by Mr. Leith, that if the estate granted to Chutterdharee in 1790 were a Raj, descendible by family custom, according to the rule of primogeniture, it lost that character on the passing of the Regulation in question. But he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord Cornwallis's Government was, presumably, to make the property restored to Chutterdharee subject to the ordinary law of succession.

Their Lordships, however, are of opinion, that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large zemindaries held as Raj, or subject to kooloochar, or family custom.

Upon the whole, then, their Lordships have come to the conclusion, that the Courts below were right in holding that the estate granted to Chutterdharee in 1790 was the Raj of Hunsapore, and that

the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late Maharajah, which it is nevertheless necessary to consider, since the title of the respondent to at least part of Chutterdharee's estate may depend on the will.

It is too late to contend that, because the ancient Hindoo Treatises make no mention of wills, a Hindoo cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitacshara, a Hindoo without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected, that a Hindoo in those provinces, who has sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the Mitackshára his sons in both cases take, on their birth, an interest in the property, which their father without their consent cannot displace.

For the respondent it is contended, that this question is concluded by th Bithoor Case, (9 Moore I. A. p. 96). It cannot be denied that in that case the testator being a Mahratta, domiciled at Cawnpore, and having real as well as personal estate, made by will an unequal distribution of both amongst his sons; and that his legal power to do so was affirmed by this Committee, and by both the Courts below. The Appellant, however, insists that this decision is opposed to the law of the School of Benares, and relies on the texts of the Mitackshara, which show that a father cannot alienate his self-acquired lands, or make an unequal distribution of them by partition, without the consent of his sons; and also upon passages in "Strange's Hindoo law" and other authorities. Mr. Leith, on the other hand, has argued that all these authorities are to be reconciled with the decision in the Bithoor case, by holding that they relate to property acquired by the father, with the use or by the aid of ancestral estate; and that they have no application to separate and self-acquired property, in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well-founded, or whether, if it be not so, the present case must be governed by the Bithoor case. For if they are right in holding that the grant was of a Raj descendible according to the custom to the eldest male heir, the question whether, according to the law of the Benares School, a Hindoo can by will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent does not in this case arise. The only person entitled to impeach the disposition by will is Oogur Pertaub, the eldest grandson, who is a consenting party to it. There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their grandfather in his self-acquired lands, which is the foundation of the supposed restriction on his power; and *cessante ratione legis cessat ipsa lex*. (See the remarks of Sir William Mac Naughten on the case of Esharchunder Rai, 1 W. Mac. 7.)

It follows, then, that either by the special law of inheritance, or by the will, the respondent was entitled to the estate of Hunsapore, and to whatever other wealth the late Maharajah could dispose of by his will.

Mr. Field has objected that his ruling does not cover that portion of the estate (if any) which come to Chutterdharee from his father, Mohesh Dutt. This may be true, but their Lordships are of opinion that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show

1868.

4th March.

PRIVY COUNCIL DECISIONS.

what that property (if any) was. And the respondent being in possession of the whole, it was for the appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With repect to questions raised by either appeal touching the amount of the Babooana allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say, that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross appeal with costs. The appellant and the respondent will each bear the costs of his appeal.

MAY, 1868.

E. T. TREVOR, ESQ., AND A. MONEY, ESQ., C. B.

Erratum.

Circular No. 3 of April, 1868, in which Circular No. 7 of March, 1868, has been inadvertently repeated, is cancelled.

No. 1.

The following additions are to be made in Chapter I of Board's Rules :—

Page 2, Section II, Rule 1A. In all cases where it is known beforehand that the whole land required is divisible into portions, in which the interests are entirely separate, and held by separate persons, a separate notification, under Section 2, should be issued as to each portion.

Page 4, Section V, Rule 5A. By the term "joint interests" in Section X, Clause 1, Act VI of 1857, is to be understood unity of possession, either actual or virtual, where two or more persons hold under the same title in undivided shares, as in the case of a joint Hindoo family. By the term "distinct and separate interests" in Clause 2 of the same Section is to be understood interests not arising under the same title, nor of the same nature, as where A is zemindar, and B is putneedar or mouraseedar under him.

Page 5, Section VI, Rule 3A. If the appointment of the arbitrators in any case is so inconsistent with the substantive provisions of the Act, as to be merely void in law, the Collector may treat the appointment as a nullity, and notify to the persons interested that unless within fifteen days they concur with him in the appointment of a single arbitrator, or nominate one on their own side, he will proceed to appoint a single arbitrator under Section XI of the Act.

Page 4, Section V, Rule 5B. If the persons holding such separate and distinct interests cannot agree in the appointment of an arbitrator on their joint behalf, the Collector should proceed, under Section X, Clause 2, to refer the compensation for each distinct interest to a separate arbitration. But in all cases where it becomes a question whether to institute separate references to arbitration, or to select one of the claimants to represent the rest, the matter should be referred for the orders of the Commissioner.

Page 11, Section XI, Rule 6. The Commissioner and Board of Revenue cannot set aside or modify any order passed by the Collector, save in cases under Section 10, Clause 2, Section 21 or Section 26 of the Act.

No. 2.

The Board find it necessary to call attention to the terms of the Sections of Act XI of 1859, which provide for the separation of accounts for the payment of revenue. It must be kept in mind that applications from parties who are merely owners of shares in villages or in other specific portions of estates, and not owners of shares, of the estate, or of specific lands capable of definition by area, and boundaries, and the other special particulars required by Section XI of the Act, cannot be admitted.

No. 3.

The following alterations are to be made in Section VII, Chapter II of the Board's Rules at pages 25 and 26.

In the form of Register annexed to Rule 7, page 25, strike out column 4.

For the first paragraph in Rule 8, page 26, substitute—

"There is to be a separate series of entries in the Register for the notes of each value, every separate series being headed accordingly."

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May.

REVENUE CIRCULARS.

In Rule 10, after "treasure chest," insert "the notes of each value being tied separately together."

No. 4.

As doubts have been expressed whether any proprietary allowance is to be given to a zemindar when, on his recusancy, an alluvial accretion to his estate is settled with an under-tenant agreeably to Rule 7, page 283, Board's Rules, the Board desire that after the words "managed by the Collector" in line 5 of Rule 4 in that page, the words "or settled with an under-tenant" be added.

No. 5.

With reference to paragraph 9 of Circular No. 6 for January, 1866, Commissioners are requested to submit, as soon as possible, Reports showing how far the orders of Government, for the settlement of resumed revenue-free estates, have been carried out within their respective divisions, and how much remains to be done.

No. 6.

An instance having been brought to the notice of the Board in which a Collector acted on a petition presented to him under Section VIII, Regulation VIII of 1819, from a party who was not the registered proprietor of the estate, the following rule has been drawn up for the purpose of preventing such irregularities in future. It should be added to Section X, Chapter XVI of the Board's Rules at pages 242 and 243.

2A. Every application under Section VIII, Regulation VIII of 1819, should be referred on receipt to the record-keeper for report, and it should be acted upon only if the record-keeper reports that the applicant is the recorded proprietor of the estate.

The following should also be added at page 243:—

3A. Collectors should not receive payment of arrears due from putneedars. Such payment should be made to the zemindars direct, except when a putneedar, a talookdar of the first degree, contests the demand of an arrear made by the zemindar, in which case deposit must be accepted, under Clause 2, Section XXV of the Regulation, to stay the sale. This ruling does not affect dur-putneedars, who come under the provisions of Clause 2, Section XIII of the law.

No. 7.

The following alteration should be made in the List of Holidays in Section 1, Chapter IX, page 157 of the Board's Rules:—

Opposite the holidays Dole Jattra and Dewali or Kali Poojah in the column for "the Lower Provinces generally," add 1 and 2 days respectively.

Note.—It is to be understood, however, that these holidays are applicable only to Executive Officers in the Districts as well as at the Presidency, and do not apply to Judicial Offices, under which latter category are included Magisterial Officers.

The following is substituted for the List of Holidays sanctioned for the Chittagong Division:—

Sreepunchmee	...	...	...	2 Days
Siva Ratri	...	...	..	2 "
Dole Jattra	...	..	...	2 "
Choit Sankranti	...	...	...	1 "
Dasha Hara	...	...	...	0 "
Roth Jattra	...	...	...	0 "
Jummo Ostomi	...	...	...	2 "

Mohalya	...	...	1 Day.
Doorga and Lucki Poojah	...	...	12 "
Dewali or Kali Poojah	...	...	1 "
Juggodhathri Poojah...	...	...	0 "

No. 8.

As it is occasionally necessary for Revenue Officers acting judicially to order the payment of stamp duty under Clause 1, Section 17 of Act X of 1862, and as a book must be kept up under Clause 2 of the same Section, the following addition should be made after Register M. at page 218 of the Board's Rules:—

Register (N.) of payment of stamp duty and penalty.

2. Name of party executing the document. 3. Description of the document. 4. Amount received by way of duty. 5. Amount received by way of penalty.

No. 9.

The following correction and addition should be made to Rule 2, Section XII, at page 187 of the Board's Rules:—

After the name Rajshahye, omit the word "and," and after Rungpore, add the words "and the Districts of the Cuttack Division."

No. 10.

The following sentence should be added to Rule 1, Section 3, Chapter XII, Board's Rules, page 193:—Should the Exhibit consist of one or more pages forming a portion only of a book, or bundle of papers tied or bound together, such page or pages need alone be attested.

No. 11.

The following amendments have been made in Chapter XXVI of the Board's Rules under the sanction of Government:—

Page 355, Rule 12A.

Add the following after the last sentence of the present Rule:—

"Holders of lots under commutable leases, under the old Rules, for Darjeeling Assam, and Cachar, may obtain a similar indulgence, under the orders of Government, dated 14th December, 1867.

New Rule 12B

Similarly portions also of lots of either description may be relinquished and previous payments transferred to the credit of the portions retained; provided that in such cases the blocks to be relinquished and retained shall be compact in themselves, and shall be so formed as to satisfy fully the conditions laid down in Rule 5, Section 1 of this Chapter. Provided also that it shall be open to the Board of Revenue, on the recommendation of the local authorities, to order the credit to Government of so much of any sums paid as interest on account of the portions of lots thus surrendered as may be considered to be a fair rent for any beneficial use, which the grantee may have made of any portion of the land which he surrenders during his possession of it An application under this Rule must be made before the 30th November, 1868.

1868.

May.

REVENUE CIRCULARS.

New Rule 12C.

In any case it shall be competent to the Commissioner, with the Board's approval at the time of the separation, to enquire into, and fix the proportionate value of the portions of lots to be resigned and retained respectively, should there appear to exist special reasons for so doing, otherwise the price of the portion retained will be calculated in the proportion which its area bears to the entire area of the original lot.

NOTE.—This Rule only to apply to lots purchased in fee-simple, or commuted before separation.

For Rule 4 at page 356 substitute the following new Rule 4:—

Grantees, under the Rules of 1854 in the Tea Districts of Assam, Sylhet, Cachar, and Chittagong, are permitted, under the special orders of Government, to apply at any time before the 31st December, 1870, for the redemption of the revenue of their grants, whether they have complied with the clearance conditions under which those grants were made, or not; provided that the local officers shall satisfy themselves of the existence of a *bonâ fide* Tea Garden, and provided that the area of the holding to be retained be reduced; so that in the portion retained, the uncleared area will not bear a larger proportion than nine-tenths to one-tenth of cultivated area.

New Rule 4A.

Any such grantee wishing to continue to hold a compact portion of his holding on the rent-paying terms on which he originally took the holding, can do so subject to the proviso stated in the preceding Rule.

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals. If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*. In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Uesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	
Wednesday ...	Ditto ... Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given, and a list made out ...	Miscellaneous Appeals.	
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	
Friday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter ... Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

Note.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman, and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
Bograh	Noakhally	Purneah	Rajshahye
Shahabad		Sylhet	Pubna
Tirhoot		West Burdwan	24-Pergunnahs

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THE

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AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS, WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS; SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

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Under Section XV of the Letters Patent.

1868.

25th February.
CIVIL JURISDICTION.

CASE 13 OF 1867.

Juddooputtee Chatterjee, *Appellant, versus* Chunder Kant Bhuttacharjee and others, *Respondents.*

Before *Peacock*, C. J., and *L. S. Jackson* and *Macpherson*, J. J.

Baboos Chunder Madhub Ghose and *Mohinee Mohun Roy* for Appellant.
Mr. R. E. Twidale for Respondents.

There is no provision in law for an order of Court striking out an original plaintiff's name, and substituting that of a person claiming to have purchased his rights Such an order is without jurisdiction, and may be corrected by High Court under the powers given by the Letters Patent.

Peacock, C. J.—In this case Chunder Kant Bhuttacharjee and others sued Bindabun Chunder Mookerjee. Whilst the action was going on, the defendant, under an Act X decree, which he had obtained against the plaintiffs, caused the rights and interests of the plaintiffs to be sold, and the property was bought in the name of Juddooputtee Chatterjee.

It was alleged that the purchase so made was made benamee for the defendant, Brindabun; but it is said that that fact has not been proved. It appears to us that it makes no difference whether the purchase was benamee or not.

Afterwards an application was made by Juddooputtee to have his name substituted in the suit for that of the plaintiff. Under Act VIII of 1859, the Judge might possibly have allowed Juddooputtee to be added as a co-plaintiff, in order that he might protect the rights which he had purchased under the execution; but we are not aware of any Section in Act VIII under which the Court was authorized to substitute Juddooputtee's name for that of the original plaintiff.

Subsequently another application was made in the name of Juddooputtee, under Section 97 of Act VIII, that he might be permitted to withdraw the suit, with liberty to bring a fresh suit, and upon that application an order was made that the suit should be withdrawn. Thus, by the effect of the two orders, Juddooputtee got the control of the suit; and having got the control of it, he withdrew it altogether. Neither of these orders was one contemplated by Act VIII.

I have shown that, by the first order, the original plaintiff's names ought not to have been withdrawn at all; and if they had remained as co-plaintiffs with Juddooputtee, Juddooputtee could not, as one of several co-plaintiffs, have withdrawn the suit without the consent of the other. Neither order was one of that description in respect of which the Legislature intended to give an appeal to the next superior Court, nor was it one in respect of which they intended to declare that there should be no right of appeal. It is true that it was an order passed in the course of the suit prior to decree; and if it had been an order which the Court had power to make, it would have been one in respect of which the Legislature have declared, by Section 363 of Act VIII of 1859, that no appeal should lie prior to decree. But the orders contemplated by Section 363 are orders which may be set right upon an appeal against the decree. The present order, as remarked by one of my learned brothers in the course of the argument, was not one which could be subsequently set right by appealing against the decree, inasmuch as it was one which, if binding, would prevent a decree from ever being made in the suit. It was an order which was made without jurisdiction.

It was also suggested by one of my learned brothers in the course of argument whether, if the Sudder Ameen had made an order that the suit should not be heard for twenty years, such an order would be binding. It appears to me that such an order, as well as the order in question, would be one over which this Court, in the exercise of the power of superintendence vested in it by Section 15 of the 24 and 25 Victoria, Chapter 104, would have a control.

We think that the order of Mr. Justice Norman was correct, and that the order of the Sudder Ameen was properly set aside. The order will therefore be affirmed with costs of this appeal.

Macpherson, J.—I concur.

Jackson, J.—I am of the same opinion.

It appears to me that the order of the Sudder Ameen was passed without

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jurisdiction, and that the party aggrieved had no other remedy except by application to this Court under Section 15 of the 24 and 25 Victoria, Chapter 104.

The Sudder Ameen appears to have fallen into an obvious error. On its being certified to him that a particular party had acquired by purchase the rights of the original plaintiffs in the suit, he seems to have considered that the whole rights and status of those plaintiffs had been extinguished, and that the purchaser should be substituted for them.

Section 73, Act VIII of 1859, gives the Civil Courts the fullest powers in respect of directing parties interested to be added as parties to a suit; but there is no provision, as already remarked by the Chief Justice, for striking out from the suit either plaintiffs or defendants.

The Sudder Ameen, in permitting the plaintiff to withdraw his suit, has passed an order which does not fall within the purview of Section 97 of Act VIII, inasmuch as he has allowed one plaintiff, without the concurrence of the other plaintiffs, to withdraw the suit in which all were before the Court.

I observe that where an order was made plainly consistent with the terms of Section 97, and an appeal was laid against it, (*see* the case of Doucett *versus* Wise, I Weekly Reporter, page 322,) this Court declared that it would not interfere with the discretion exercised in the particular case, but not that an appeal could not lie.

Here the case is very different. An order has been made which is not consistent with the terms of the law, and I therefore think that it was not only competent to this Court, but also the duty of this Court, to set aside on application that which had been irregularly done, and to require that to be done which the law required should be done.

CASE 792 OF 1866.

31st March.

Special Appeal from Rungpore.

Hurro Chunder Roy Chowdhry and others, (Defendant) *Appellants, versus* Shoorodhonee Debia, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Loch*, *Kemp*, and *Macpherson*, J. J.

Messrs. J. Cochrane and *R. E. Twidale*, and *Baboo Romanath Bose* for Appellants.

Baboos Sreenath Dass and *Nil Monee Sein* for Respondent.

B as heir sued A, a Hindoo widow, to set aside a deed of permission to adopt, and to obtain possession of the property. He got a decree on both points, which on appeal was reversed, as regards the possession of the estate. A then took out execution of the Appellate Court's decree in the Lower Court, and also applied for mesne profits for the time she was out of possession, though these were not mentioned in the Appellate decree. B appealed

This case was referred to a Full Bench, on the 29th August, 1866, under the following orders, by Peacock, C. J., and Shumboonath Pundit, J.:—

Peacock, C. J.—If this case is barred by limitation, the appeal must be allowed, and the decisions of the Lower Courts reversed; but if the case is not barred by limitation, the decree must be amended by disallowing the amount of costs in respect of the investigation by the Ameen. They were expenses which had been incurred in prosecuting an execution which wholly failed. It is not because expenses have been saved in this case, in consequence of the proceedings having been taken in another case which has failed, that the plaintiff is entitled to recover the costs in this case, either as damages or costs.

As regards limitation, I think the point must be reserved for the consideration of a Full Bench, inasmuch as our view of Section 14, Act XIV of 1859, conflicts with the view taken by Justices Loch and Glover in the case reported in I Wyman's Reporter, page 33.

In that case a decree passed by a Zillah Judge was sought to be executed in the Principal Sudder Ameen's Court, and the Principal Sudder Ameen struck off the case as beyond his jurisdiction. The learned Judges held that the word "suit" in Section 14 did not apply to the case of an execution, and consequently that the plaintiff having applied to a wrong Court for the exe-

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cution of his decree, could not deduct the time occupied in that proceeding in calculating the time within which the application to the right Court for execution ought to have been made. If the construction of the learned Judges be correct, the time occupied by the plaintiff in this case, in endeavouring to recover the mesne profits in an execution case, cannot be deducted.

If, on the other hand, the learned Judges are not right, and the proceedings to enforce an execution for the same amount against the person who is now defendant may be treated as a suit, &c., the plaintiff would be entitled to an allowance of that time.

The words of Section 14 are:—"In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which in appeal shall have been amended for any such cause, including the time during which such appeal (if any) has been pending, shall be excluded from such computation."

In this case the lessee, who was the defendant in the former suit, having been ordered to restore the possession of the property taken in execution under a decree which had been reversed, sought, by execution of the decree of the Appellate Court, to recover the mesne profits of the land during the time they had been held under the decree which was subsequently reversed. Having failed in that proceeding, she now sues by action to recover the same mesne profits, and in determining the question whether the action is barred by limitation, we have to decide whether she is entitled to deduct the time occupied in the execution proceedings. The question is whether the proceeding in execution is the prosecution of a suit upon the same cause of action against the same defendant within the meaning of Section 14, Act XIV of 1859. The words "against the same defendant," as my learned brother Shumboonath Pundit suggests, mean the person who is now defendant.

Section 20 says:—"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution." The word "suit" does not necessarily mean an action in its ordinary restricted sense; any proceeding to enforce a demand is a suit; the person who defends himself against the enforcement of the demand is a defendant; and the demand is the cause. I therefore think that the endeavour to enforce a demand by execution may fairly be considered as the prosecuting a suit for that demand.

To show that the words "enforcing an execution" may be considered a suit within the meaning of Section 14, I would refer to the preamble and the title of the Act. The title is—"An Act to provide for the limitation of suits," and it recites that—"Whereas it is expedient to amend and consolidate the laws relating to the limitation of suits, it is enacted as follows."

If, as held by the learned Judges in the case to which I have referred, Section 14 does not include proceedings to enforce by decrees for execution, one would have expected the title to be—"An Act to provide for the limitation of suits and of the enforcement of decrees," and a corresponding recital. Each of the Sections is one of the enactments included in the recital under the words "It is enacted as follows," in the recital.

Suppose Sections 19 to 22 had been the first four Sections of the Act, could it be concluded that a proceeding to enforce a decree was not a prosecuting of a suit for a cause of action within the meaning of Section 14? I think not.

I apprehend, therefore, that Section 14 was intended to apply to those Clauses which related to the enforcement of decrees, and that the words "suit"

against the order of the Lower Court awarding and fixing mesne profits. The High Court reversed the order as to mesne profits, saying the Lower Court had gone beyond its jurisdiction in importing their award into the decree of the Appellate Court. A should have applied to the Appellate Court for them, or sued for them in a regular suit. A forthwith instituted a suit for them. B now pleading limitation, the question arose whether A was entitled to a deduction for the time during which she was prosecuting her claim for mesne profits in execution, which the High Court had disallowed.

Held by the majority (Loch, J., dissenting) that the word "suit" in Section 14, Act XIV of 1859, included such proceedings in execution.

Held by the majority (but Peacock, C. J., dissenting) that the order of the Lower Court awarding the mesne profits had not been reversed on the ground of want of jurisdiction as contemplated by the Section, and therefore A was not entitled to have the time spent in those proceedings deducted.

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and "cause of action" may very fairly be read as meaning an application to enforce an execution to recover the same subject-matter which subsequently forms the cause of action against the same person as the defendant in the subsequent suit.

Seeing that these Clauses are introduced into an Act which is simply an Act for the limitation of suits, I think the above construction is a very reasonable one; and that unless such a construction be put upon the Act, the full object of the Section will not be obtained. But I express no final opinion on the point; and as the view I now take differs from that taken by my learned brother Loch on that point, I shall leave my mind free for a fuller consideration of the question when it comes before a Full Bench, and I have had the advantage of conferring with the other Judges upon the subject, of discussing the matter with them, and of becoming acquainted with their views and arguments.

Pundit, J.—I concur.

JUDGEMENTS OF THE FULL BENCH.

Peacock, C. J.—The present appellant is the defendant in a suit brought against him by the respondent for mesne profits. In that suit it was held that the mesne profits amounted to rupees 8,116, odd annas, and the plaintiff obtained a decree in her favor for the balance due to her. The decision of the Principal Sudder Ameen was affirmed as to the mesne profits by the Zillah Judge. The defendant appealed specially to this Court, and one ground of appeal is that the suit is barred by limitation. The question whether it is or is not so barred has been referred to a Full Bench.

The facts are clearly stated in the judgment of Mr. Fowle, the Zillah Judge, affirming the judgment of the Principal Sudder Ameen.

It appears that, many years back, the present defendant sued the present plaintiff in the Principal Sudder Ameen's Court to set aside a deed under which she claimed power to adopt a son. In that suit the present defendant, who was then plaintiff, also sought to recover possession of the lands which belonged to the husband, to whom he claimed to be reversionary heir in the absence of a valid power to the widow to adopt. He obtained a decree setting aside the deed, and also for possession of the lands. He executed that decree in August, 1857. The present plaintiff, who was the defendant in that suit, appealed to the Sudder Court, and that Court, on the 13th of May, 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the then plaintiff, and directed that the property should remain with the present plaintiff, who, as widow in the absence of an adoption, was entitled to the estate during her life as heir of her deceased husband.

After the decree of reversal by the Sudder Court, the plaintiff applied to the Principal Sudder Ameen for restitution of the property from which she had been turned out under the erroneous decree, and in November, 1858, she was restored to possession of the lands. This suit is brought to recover the mesne profits received by the defendant from the plaintiff's estate during the time he was in possession under the erroneous decree, and the question is whether the suit is barred by limitation. At the time when the plaintiff applied to the Principal Sudder Ameen for restitution of the lands, she also applied to the Principal Sudder Ameen to enforce from the defendant restitution of the mesne profits which he had received whilst he was in possession of her estate by force under the erroneous decree. The Principal Sudder Ameen entertained her application, and appointed an Ameen to ascertain the amount of the mesne profits for the period in question. The proceedings before the Principal Sudder Ameen were pending from 1858 to the 19th of March, 1864, when the amount of mesne profits having been ascertained, the Principal Sudder Ameen ordered them to be paid to the plaintiff. From that order an appeal was preferred to the High Court, and on the 6th of September, 1864, it was held by a Division Bench, consisting of Mr. Justice Loch and Mr. Justice Seton-Karr, that the Principal Sudder Ameen went beyond his jurisdiction in giving mesne profits, which the Sudder Court, passing the decree of reversal, had not provided for, or

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had purposely omitted. (See I Weekly Reporter, Miscellaneous Cases, page 5.) They said :—"The decree-holder may be entitled to mesne profits: but when application was made to the Court below, it should have referred the applicant to the Court making the decree, or to a separate suit. As the Court below has in this matter *acted altogether without jurisdiction*, we quash the decree, and decree the appeal with costs."

The plaintiff applied for a review of that judgment of the Division Bench, which was rejected on the 28th January, 1865. In February, 1865, the plaintiff commenced this suit, and limitation was set up as a bar to its maintenance.

The Lower Courts held that, in calculating the period of limitation, a deduction ought to be made of the period between November 1858 and the 28th January 1865, during which time the plaintiff was occupied in endeavouring to obtain the mesne profits by proceedings in the Court of the Principal Sudder Ameen, in which she was successful, and also in the appeal which the defendant preferred to this Court against the order of the Principal Sudder Ameen, in which the decision of the Principal Sudder Ameen was reversed.

Six years from the time when the cause of action arose, is the period of limitation fixed by law for suits for mesne profits. The plaintiff was turned out of possession in August, 1857. She commenced this suit in February, 1865. If the period between November 1858 and the 28th of January 1865, when the review was rejected by the Division Bench, or even of the period between November 1858 and 6th September 1864, when the decree of the Division Bench was passed, be deducted, the suit is in time.

The question as to whether either of those periods ought to be deducted depends upon the construction of Section 14, Act XIV of 1859; and it has been referred to a Full Bench for decision in consequence of a case which is reported in I Wyman's Reporter, page 33. At the time when the case was referred to a Full Bench, I gave my reasons for dissenting from that decision, in which it was held that an application for execution was not a suit within the meaning of Section 14.

Section 14 enacts that, "in computing any period of limitation prescribed by the Act, the time during which the claimant shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, *from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which on appeal shall have been annulled for any such cause*, including the time during which such appeal, if any, has been pending, shall be excluded from such computation."

The points for determination are, *first*, whether the prosecution of the claim for mesne profits in the miscellaneous proceedings before the Principal Sudder Ameen was the "prosecuting of a suit" against the same defendant; *secondly*, whether the mesne profits which the plaintiff then claimed, being the same as those for which she is suing in the present action, can be said to be the same cause of action against the same defendant within the meaning of Section 14; and, *thirdly*, whether the Court of the Principal Sudder Ameen was a Court of Judicature, which, from defect of jurisdiction or other cause, was unable to decide upon the claim, or which had passed a decision *which on appeal was annulled on account of any such cause.*

I have already expressed my opinion upon the two first points in the judgment which I pronounced upon referring the case to a Full Bench, and I entertain no doubt that the prosecution in a Court of Judicature of a summary application to enforce the restitution of mesne profits received under an erroneous decree which has been reversed, is the prosecution of a suit within the meaning of the Act; that if the proceedings were for the same demand for which a suit is subsequently brought, and against the same person, the prosecution of the claim is a prosecution of a suit for the same cause of action against the same defendant within the meaning of the Section.

The word "suit" does not necessarily mean an action, nor do the words "cause of action" and "defendant" necessarily mean cause upon which an action

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has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action.

The Legislature has clearly shewn what it understood by the word "suit;" for the Act, which provides a period of limitation in the case of proceedings by process of execution to enforce judgments and decrees, as well as periods for the limitation of actions or suits in the ordinary acceptation of the words, is described merely as an "Act to provide for the limitation of suits;" and it recites that "it is expedient to amend the law relating to the limitation of suits." We ought not, in my opinion, to fritter away the law by construing words according to a mere technical sense, instead of giving them a broad meaning, so as to embrace all cases intended by the Legislature to be provided for.

We should do well, in construing the Acts of the Legislature, to take for our guidance the following remarks, which are to be found in Domat's Civil Law, Chapter 12, Section 17, page 88:—"Since laws are general rules, they cannot regulate the time to come so as to make express provision against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of a lawgiver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all; and next, it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it."

The rule in Section 14 is as necessary in regard to miscellaneous proceedings as it is with regard to suits in the strict sense of the word, and I think we shall be giving only due effect to the law, and be putting a proper and reasonable interpretation upon it, by holding that the proceedings before the Principal Sudder Ameen for the recovery of the mesne profits in execution of a decree of reversal was a suit within the meaning of Section 14 of the Act.

I now proceed to consider whether the Court of the Principal Sudder Ameen was a Court of Judicature, which, from defect of jurisdiction or other cause, was unable to decide upon the claim for mesne profits, or was a Court which had passed a decision which on appeal was annulled on the ground that, from defect of jurisdiction, it was unable to decide upon it.

But for the decision of the Division Bench of the 6th September, 1864, and which is reported in I Weekly Reporter, Miscellaneous Cases, page 5, I should have thought it clear that, as a matter of law, when the decree under which the plaintiff was turned out of possession was reversed by the Sudder Court, and it was ordered that the property should remain with the plaintiff, she had a right to be restored to the possession which she had lost, not only of the land, but also of the rents or profits which had been received by the defendant whilst he was in possession of the land by force of the erroneous decree which was reversed. When a decree orders a sum of money to be paid to a plaintiff, he is entitled to have that decree executed, although the decree is silent upon the subject of execution. It is the legal effect of a decree that it is to be executed. It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of Appeal does not necessarily enter into the question, whether a decree, which it is about to reverse, has been executed or not.

The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree, in the same manner as an ordinary decree carries with it right to have it executed, and I should have considered that a decree of reversal necessarily authorized the Lower Court to cause restitution to be made of all that the party against whom the erroneous

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decree had been enforced, had been deprived by reason of its having been enforced.

The Sudder Court ordered that the lands were to remain with the plaintiff. It did not order the lands to be restored to her; but the necessary consequence was that restitution was to be made, and restitution of the lands was made by the Principal Sudder Ameen without any objection. There seems to be no reason why he should not have restored to the plaintiff the rents and profits of which she was deprived during the time she was kept out of possession of her land, under the erroneous decree. She applied for restitution of the lands and to have those mesne profits restored to her; and, whether right or wrong, the Principal Sudder Ameen entertained her application, assumed that he had jurisdiction to order restitution of the mesne profits, and proceeded to ascertain the amount, and awarded it to her. These proceedings, which were commenced shortly after the reversal of the erroneous judgment in 1857, unfortunately lasted up to 1864, when the plaintiff obtained an order for the amount of the mesne profits of which she had been deprived. This order was reversed by a Division Bench of this Court in September, 1864. The proceedings, therefore, lasted between seven or eight years without any apparent neglect on the part of the plaintiff. In giving judgment, the Division Bench, consisting of Mr. Justice Loch and Mr. Justice Seton-Karr, said :—" The decree (meaning the decree of reversal) certainly gave Soorndonee, *i. e.*, the plaintiff, no mesne profits. It merely directed that she should be retained in possession. If she wished for mesne profits during the period she was out of possession, she should have applied to the Court passing the decree to give an order to that effect. But the Lower Court had no *authority* to import into the decree what was not there. *It went beyond its jurisdiction* in giving mesne profits which the Sudder Court, passing the decree, had not provided for, or had purposely omitted. The decree-holder may be entitled to recover mesne profits. But when application for that purpose was made to the Court below, it should have referred the applicant to the Court making the decree, *or to a separate suit;* and we do not think that, though the opinion of the Lower Court was expressed so far back as 1858, and no appeal was then preferred, we are prevented from taking up the point in the present appeal, which is from an order awarding the amount of those mesne profits ascertained by local investigation. *As the Court below has in this matter acted altogether without jurisdiction, we quash the order.*" The decree of the Division Bench, whether right or wrong, and we must assume it to be right, expressly reversed the decision of the Principal Sudder Ameen upon the ground that he had no jurisdiction.

It would seem that the Judges considered that the Sudder Court, which reversed the decree, was the proper Court to determine whether the plaintiff was entitled to mesne profits or not. They, however, said that the Principal Sudder Ameen should have referred the applicant to the Court which made the decree, *or to a separate suit.*

In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution.

It is not a mere matter of discretion with the Court which reverses a decree, whether the party against whom it was given is or is not to be restored to what he has been deprived of under it.

There can be no doubt that, in point of justice, the plaintiff was entitled to have the rents which the defendant had collected from her land whilst he was in possession of it under the erroneous decree refunded. This case is not like the case No. 249 of 1865, reported in II Wyman's Reporter, Full Bench Case, page 287, in which it was held that it was discretionary with the Court which passed the decree to award interest or not. In that case it was very properly held that the Court executing the decree could not award interest when the decree was silent as to interest.

In the case of Rajkissen Singh, petitioner, Full Bench Decision, II Wyman's Reporter, page 290, the Court said, with reference to a decree which had been reversed, " The plaintiffs must be restored, without security, to all that

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was taken from them in execution of the decree of the Lower Court." The plaintiffs ought to be put in the same position as they would have been if the decree which has been reversed had never been given.

The plaintiff was deprived for nearly a year and a half of the rents and profits of her land, not on account of any fault of her own, but under the execution of an erroneous decree. She has not been guilty of laches, nor has she been sleeping over her rights; but she seems to have been a victim to erroneous decisions of the Courts of Justice. Having got the erroneous decree reversed, she has been continuously, but unfortunately without effect, prosecuting her claim for nearly ten years; and now, after she has been referred for redress to a Civil action and has prosecuted it with success, and obtained a decree in her favor, which has been upheld by the Zillah Judge on appeal, she is to be told upon special appeal to this Court that she is barred by limitation.

It is clear that, in the miscellaneous proceeding before the Principal Sudder Ameen in 1858, the plaintiff, upon the reversal by the Sudder Court of the decree against her, applied for the same mesne profits as those which she seeks to recover in this action. The Principal Sudder Ameen awarded them to her; but this decision was reversed upon the ground that he had no power to award them. It is impossible, in my opinion, to say that the decision of the Principal Sudder Ameen was not reversed on the ground that, from defect of jurisdiction or other cause, he was unable to decide upon the plaintiff's claim to mesne profits. I am, therefore, clearly of opinion that the time during which the plaintiff was prosecuting her claim for these mesne profits by proceedings before the Principal Sudder Ameen and in the High Court ought to be deducted in calculating the period of limitation, and that the suit is not barred by limitation.

To come to a different conclusion would, I think, bring discredit upon the law and upon the administration of justice.

I wrote my judgment before the judgments proposed to be delivered by my Hon'ble colleagues were written, and I may say that Mr. Justice Trevor concurred in my opinion that the plaintiff's suit is not barred. As he has retired, his opinion has not the effect of a judgment, and as there are three Judges of a different opinion, it does not make any difference.

Having fully considered the arguments of my Hon'ble colleagues, I still retain the opinion I have expressed.

My Hon'ble colleagues, Mr. Justice Kemp and Mr. Justice Macpherson, agree with me in thinking that in the proceeding which the respondent took in the former suit to obtain the mesne profits, she was engaged in prosecuting a suit upon the same cause of action within the meaning of Section 14, Act XIV of 1859. They admit that, although it is difficult to understand how the proceeding before the Principal Sudder Ameen could have been protracted from 1858 to 1864, no case of want of *bona fides* or of due diligence in the prosecution of the former proceedings on the part of the respondent has been established.

Their judgment is founded upon this, that the decision of the Principal Sudder Ameen awarding mesne profits to the plaintiffs was reversed, not because he had no jurisdiction to hear the proceedings or suit then before him, but because he had no authority to import into the decree of the Sudder Court that which was not there. That is in effect deciding that his decision was reversed because he had no jurisdiction to go beyond the decree of the Sudder Court, and to exercise his own independent judgment as to whether the plaintiff was or was not entitled to recover mesne profits. The decision of the Principal Sudder Ameen was reversed, not upon the ground that the plaintiff was not entitled to mesne profits, but upon the ground that the Principal Sudder Ameen was not the proper Court to decide as to her right to mesne profits, and that he ought to have referred her to the Sudder Court or to a new action.

The proceeding before the Principal Sudder Ameen is admitted by Mr.

Justice Macpherson to have been a suit within the meaning of Section 14, Act XIV of 1859, and the cause of the plaintiff's application to the Principal Sudder Ameen is admitted to be the same as that for which the present action was instituted. If the plaintiff is not entitled to recover those mesne profits in this action, she will fail on the merits. For the purpose of considering the question of limitation, it must be assumed that she is entitled to recover them. The Principal Sudder Ameen held that she was entitled to them, and awarded them to her. His decision was reversed by a Division Bench of the High Court, whether right or wrong, upon the ground that he had no power to deal with the plaintiff's claim.

The plaintiff's claim to restitution before the Principal Sudder Ameen was not upon the ground that the mesne profits had been awarded to her by the Sudder Court, but upon the ground that, upon the reversal of the erroneous decree, she was entitled to the mesne profits which defendant had received whilst he was in possession of her lands under that decree.

The Principal Sudder Ameen thought that he had power to decide upon the plaintiff's claim, and he did so by awarding the amount to her. The Division Bench thought that he had no power to decide her claim, and reversed his decision upon that ground. His decision upon the claim was, therefore, annulled upon the ground that, from defect of jurisdiction or some other cause, he was legally unable to decide upon it.

If the decision of the Principal Sudder Ameen was reversed because he had not the power to award the mesne profits to the plaintiff,—a power which, it was admitted, the Sudder Court, or a Court in which a new suit might be instituted, would have had,—it must have been because he had not the power to determine whether the plaintiff ought to have them or not; or, in other words, because he had not the power, for want of jurisdiction or for some other cause, to decide the plaintiff's claim. I know of no difference between not having power by law to determine or to decide upon a question, and being unable for want of jurisdiction to determine or to decide upon it. Mr. Justice Macpherson, with whom Mr. Justice Kemp concurs, says:—"The material point was that, though the Lower Court had jurisdiction to deal with the application, the respondent who applied could not show her right to the mesne profits in the absence of a declaration of that right by the Sudder Court." I am at a loss to see how if she could not do so in the miscellaneous proceeding, she could do so in a new action.

But be that as it may, that was not the ruling of the Division Bench; they said she might have a right to the mesne profits, and that the Principal Sudder Ameen ought to have referred her to the Court which passed the decree of reversal, or to a separate suit. What was that but saying that the Principal Sudder Ameen had not the same power to determine as to the plaintiff's right, as the Sudder Court, or the Court in which she might bring a separate suit, would have.

We are not sitting on appeal from the Division Bench. We are not to say whether their decision was right or wrong. We are not to decide whether the Principal Sudder Ameen had jurisdiction or not. We are merely to ascertain upon what ground the Division Bench annulled his decision. If they had annulled it upon the ground that the plaintiff was not entitled to the mesne profits of which she had been deprived by the defendant under the erroneous decree, that would have been a different thing. But they did not do so: they annulled the decision expressly upon the ground that the Principal Sudder Ameen acted without jurisdiction.

My Hon'ble colleague Mr. Justice Loch, in his judgment, says:—"In saying, as we did at the close of the judgment, that the Lower Court acted altogether without jurisdiction, we meant only that it had exceeded its authority, not that it had no jurisdiction to try whether the plaintiff was or was not entitled to recover mesne profits." But how could the plaintiff know what they meant, unless they meant what they said? They held that the Principal Sudder Ameen exceeded his authority in deciding that the plaintiff was entitled

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to recover mesne profits, and they reversed his decision upon that ground. It appears to me that they annulled his decision upon the ground that he was unable, from want of jurisdiction or other cause, to decide upon the plaintiff's claim. They would not have reversed the decision of the Principal Sudder Ameen if he had rejected the plaintiff's claim and stated that, as the decree of reversal was silent upon the subject of the plaintiff's right to mesne profits, he was unable to decide upon her claim. If he had so decided, he would have held that, for want of jurisdiction or other cause, he was unable to decide upon it. His decision was reversed because he did decide upon it.

It seems to me to have been the object of the Legislature to prevent suitors from being barred by limitation by reckoning against them time fruitlessly but in good faith occupied in litigation in a Court which, for want of jurisdiction or other cause, has no power to decide upon their claims; or whose decision is annulled upon appeal for such cause. The time is to be deducted not only when, from defect of jurisdiction or other cause, the Court in which the claim is preferred is unable to decide upon it, but also when the Court, believing that it is able to decide upon it, passes a decision, and that decision is annulled upon appeal, upon the ground that it was not able to decide upon it, and was therefore wrong in so doing. It matters not for this purpose whether the Appellate Court is right or wrong; if wrong, it would be just as unjust to reckon the time against the suitor, as it would be if the Appellate Court was right. Parties are not to be barred by limitation by reckoning against them time fruitlessly occupied whilst they are being handed about from Court to Court by reason of doubts or erroneous decisions upon questions of jurisdiction, or of the power of the Courts to entertain claims that are brought before them for decision.

Mr Justice Macpherson says (and Mr. Justice Kemp concurs with him) that he fails to see that this case is one of any special hardship so far as the respondent is concerned; that her remedy, by way of review of the Sudder Court's decision, was suggested to her, but she did not avail herself of it.

I cannot concur in this remark. At the time when the Division Bench suggested a review, they also suggested the institution of a fresh suit as an alternative remedy. According to the view of the majority of the Judges, she was barred by limitation at the time when the suggestion was made. The plaintiff availed herself of one of the two suggestions, and commenced a fresh suit almost immediately.

If she had adopted the other suggestion, and had applied to the High Court to review the judgment of the late Sudder Court, she would probably have been told that it was matter of discretion whether the application for review should be admitted after the regular time, and that she came too late.

The judgment of the Principal Sudder Ameen was in fact reversed upon the ground that he had acted without jurisdiction; and the plaintiff has acted upon the faith of what the Judges said, and she brought a new suit according to the suggestion of the Court. How could she, or her advisers, have possibly imagined that when she should seek to have the time deducted which she had spent fruitlessly in a Court whose decision had been expressly reversed because it had acted altogether without jurisdiction, she would be told that that was not the ground of reversal? In my opinion, a reversal of the decision of the Principal Sudder Ameen, expressed to be upon the ground of want of jurisdiction, was a reversal within the meaning of Section 14 of the Limitation Act, whether the Principal Sudder Ameen had jurisdiction or not. Even if it can be said that the decision was not reversed upon the ground of want of jurisdiction, it was clearly annulled upon the ground that the Principal Sudder Ameen, for some other cause, was unable to decide upon the plaintiff's claim.

This case, like every other, must be determined according to law, and not with reference to hardship. Whether the case is one of special hardship or not, it is not for me to say; but I must say that this lady has good grounds to complain either of the uncertainty of the law, or of the manner in which it has been administered in her case.

She has been deprived of a large sum of money in consequence of

an erroneous decree which has been reversed. She has been endeavouring continuously for the last ten years to recover that of which she has been so deprived. She has had three decrees in her favor. No laches are imputed to her. One decree has been reversed with costs, and now the other two are to be reversed, and she is to be turned round upon the ground that she is barred by limitation.

Since this judgment was delivered, I have been referred to the case of Doorga Pershad Roy Chowdhry *versus* Tara Pershad Roy Chowdhry, 8 Moore's Indian Appeals, page 310; (same case, Sutherland's Privy Council Cases, 427). The case is somewhat analogous. The Privy Council hold that, under the old Law of Limitation, the time during which the plaintiff was fruitlessly endeavouring to obtain mesne profits in execution of an erroneous order, which was subsequently set aside, was not to be reckoned against him in calculating limitation.

Loch, J —It appears to me that the only safe course for a Court executing a decree to take, is to execute it strictly, without importing into it anything that is not distinctly comprised in it. There can be no doubt that the plaintiff in this case, when she recovered possession of the property from which she had been evicted under the erroneous decree of the Lower Court, was entitled to the mesne profits for the period during which she was out of possession; but the decree of the Sudder Court was silent on the subject, and consequently I hold that the Lower Court, in executing that decree, should have confined itself to what that decree gave the plaintiff, *viz.*, possession. If the plaintiff required mesne profits for the period of dispossession, she had only to ask the Court which passed the decision to supply the omission, or she might have brought a suit to recover the amount. Either course was open to her, and when the order of the Principal Sudder Ameen awarding mesne profits was reversed by a Division Bench of this Court in September, 1864, she had then plenty of time to make application to the Court.

In the Shooshung case, reported at II Weekly Reporter, page 80, Civil Rulings, the Division Bench reversed the order of the Lower Court, which had been executed before the appeal was heard, and directed that the appellant should be restored to possession, and recover from the respondent all sums realized by him during his possession under the erroneous decree, with interest. Such an order should have been made in the plaintiff's case, and till it were made, the Principal Sudder Ameen should have confined himself to giving back possession as decreed to the plaintiff.

With regard to the word "suit," as used in Section 14 of Act XIV of 1859, if that and other Sections, such as 11 and 12, had been placed after Section 23, there would, I think, have been little doubt as to the meaning of the word, and that the provisions of the Section applied equally to all the previous Sections. Placed as it is in the middle of the Act, it appears to me to refer only to what has gone before, and to relate only to suits previous to judgment. Section 18 appears to me to draw a line between the two parts of the Act. Suits are not mentioned again in the remainder of the Act, and the words of that Section certainly apply to what has gone before, and not to what follows.

It may be said that proceedings in execution are only a continuance of the suit; that they are merely the necessary steps taken to secure the benefit of the suit which has been decreed, and, as such, are but the subsequent parts to make it complete. While I admit this, I must at the same time assert that in the Courts of this country not established by Royal Charter, the suit has always been considered to come to an end with the judgment, and applications for execution were looked upon as separate proceedings; and, looking at the Act, it appears to me to be drawn up with a recognition of this distinction between the suit itself and the proceedings which followed, and related to the execution of the decree passed in the suit. The judgment of the late Sudder Court, dated 17th December, 1860, reported at page 401, 2nd Volume, Sudder Dewanny Adawlut Reports, shews the distinction which used to be drawn between suits and proceedings taken in execution. I do not think that any argument in favor of the

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view taken of the word "suit" in the order of reference can be gathered from the title of this law, when it is remembered that, up to the passing of Act XIV of 1859, we had no Statute Law prescribing the time within which execution of decrees should be taken out, and that "limitation," when it is used in the Regulations, applies to suits in which no judgment had been passed, and not to proceedings taken after judgment has been delivered. Wherever the word "suit" is made use of in Act XIV of 1859, it means cases in which no judgment has been pronounced, and it appears to me that the word was not intended by the Legislature to be applied to proceedings to enforce execution of a decree.

Holding the opinion I have expressed above, it is hardly necessary for me to say more, but as I was one of the Judges who passed the order of September, 1864, I think it proper to explain the meaning of the words "want of jurisdiction" used in that judgment, and which may be gathered from the earlier part of that judgment. A Court may have no jurisdiction at all, or having jurisdiction, it may exceed its authority, and thus be said to act without or beyond its jurisdiction. The words used were,—"But the Lower Court had no authority to import into the decree what was not there. It went *beyond* its jurisdiction in giving mesne profits, which the Sudder Court, passing the decree, had not provided for, or had purposely omitted." In saying as we do at the close of the judgment, that the Lower Court acted "altogether without jurisdiction," we meant only, that it had exceeded its authority, not that it had no jurisdiction to determine whether the plaintiff was or was not entitled to recover mesne profits. The Full Bench, in its judgment of the 31st August, 1866, reported at II Wyman's Reporter, page 221, in giving an explanation of the words "exercised a jurisdiction not vested in it by law," used in Section 35, Act XXIII of 1861, held that these words comprised not only cases in which the subordinate Appellate Court had no jurisdiction at all, but also cases in which such Court having jurisdiction exceeds its jurisdiction. In this latter sense, I consider that the Principal Sudder Ameen acted without jurisdiction in this case.

Even if I concurred in the opinion expressed by my learned colleagues, that the proceedings taken in execution of a decree were a suit within the meaning and intention of the Act XIV of 1859, I should not be prepared to allow the plaintiff the benefit of the time during which she was engaged in carrying out the execution proceedings in the Principal Sudder Ameen's Court, unless the words "defect of jurisdiction or other cause," mentioned in Section 14 of that Act, can be held to apply to cases in which a Court has acted in excess of its jurisdiction.

Macpherson, J. (*Kemp*, J., *concurring*).—I concur with the Chief Justice in the opinion, and in the reasons given for the opinion, that in the proceedings which the respondent took in the former suit to obtain *wasilat*, she was (within the meaning of Section 14 of Act XIV of 1859) "engaged in prosecuting a suit upon the same cause of action." But I regret that I differ in the conclusions at which I have arrived upon the other questions which arise in this reference.

Section 11 requires that the prosecution of the suit shall have been carried on *bonâ fide* and with due diligence. I cannot say that want of *bona fides* or due diligence in the former proceedings has been proved. Nevertheless, it is difficult to understand how the proceedings before the Principal Sudder Ameen, which had for their object merely the ascertainment of the mesne profits of less than two years, could have been protracted from 1858 to 1864, if any reasonable diligence had in fact been exercised by the respondent.

Then, was the decision of the Principal Sudder Ameen awarding *wasilat* annulled by the High Court (on September 6th, 1864), from "defect of jurisdiction," or "for any such cause?" In disposing of this point, I shall express no opinion as to whether the Division Court was right or not in reversing the order of the Principal Sudder Ameen, for that question does not directly arise on the present reference.

It seems to me that the order of the Principal Sudder Ameen was not an-

nulled for a defect of "jurisdiction," *properly so called*, or "for any such cause." No doubt, in the judgment of the 6th September, 1864, the word "jurisdiction" is used. But it was not used there in its proper sense, nor in the sense in which it is used in Section 14 of Act XIV of 1859. The Court said*:—"But the Lower Court had no authority to import into the decree what was not there. It went beyond its jurisdiction in giving mesne profits, which the Sudder Court, passing the decree, had not provided for, or had purposely omitted. The decreeholder may be entitled to recover mesne profits. But when application for that purpose was made to the Court below, it should have referred the applicant to the Court making the decree, or to a separate suit, and we do not think that, though the opinion of the Lower Court was expressed so far back as 1858, and no appeal was then preferred, we are prevented from taking up the point in the present appeal, which is from an order awarding the amount of those mesne profits, ascertained by local investigation. As the Court below has, in this matter, acted altogether without jurisdiction, we quash the order, and decree the appeal with costs."

* I Weekly Reporter, Miscel., 5.

The sense in which the term "jurisdiction" was intended to be used is, I think, clear, and is to be found in the passage in which it is said that "the Lower Court had no authority to import into the decree what was not there." It cannot be said that the Lower Court had not jurisdiction, in the ordinary sense of the term, to deal with this matter. The original suit was one in which the Court admittedly had jurisdiction, and any application made in the course of the suit, whether with a view to execution or otherwise, was made to a Court having jurisdiction. It is one thing to say that a Court has not the power to make, or cannot properly make, a particular order in a suit, and quite another thing to say that the Court has not jurisdiction to entertain the suit, or the particular application which it ought not to grant. In disposing of the question properly before it and cognizable by it,—as to how effect was to be given to the decree of the Sudder Court,—the Lower Court gave to the respondent more than it should (in the opinion of the High Court) have given; and so far as it gave too much, its order was reversed. The Lower Court might, beyond all doubt, (even according to the ruling of the Division Court,) have made the order which it passed, if the Sudder Court had declared the respondent's right to the *wasilat* which she sought. It was not because it had no jurisdiction, but because the Sudder Court had not declared the right, that the Lower Court was deemed to be wrong in giving the mesne profits There was, in fact, no want of jurisdiction, nor anything of the kind; and I think that the learned Judges, in their judgment of the 6th of September, 1864, said no more than that the Lower Court ought not to have acted as it did without a distinct declaration by the Sudder Court of the respondent's right to the *wasilat*. The material point was, that though the Lower Court had jurisdiction to deal with the application, the respondent who applied could not show her right to the mesne profits in the absence of a declaration of that right by the Sudder Court.

I think that the appellant's contention is right, and the respondent's suit is barred by limitation.

The Law of Limitation often operates with much hardship upon individuals. But I fail to see that the present case is one of any special hardship, so far as the respondent is concerned. Her remedy by way of review of the Sudder Court's decision was suggested to her, but she did not avail herself of it, which, with reference to the provisions of Act XIV of 1859, if for no other reason, she certainly ought to have done.

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CASE 240 OF 1867.

Regular Appeal from Patna.

Gour Buksh Lall, (Defendant) *Appellant*, *versus* Mussamut Doolar Doyee and others, (Plaintiffs) *Respondents*.

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Hem Chunder Banerjee and *Nilmadhub Sein* for Appellant.
Baboos Mohendro Loll Shome and *Kullee Mohun Dass* for Respondents.

Where plaintiff sues A and B, alleging that though B is the certified purchaser of the property, which he (plaintiff) is seeking to recover, yet A is in possession, and was the real purchaser, B's name should be struck out of the record. If it is not so, B can appeal to have the case dismissed as against him.

Jackson, J — This is a third appeal arising out of the same decision which originated appeals Nos. 24, and 242, which were heard before us yesterday. The present appeal is on behalf of Gour Buksh Loll, one of the certified purchasers, and his contention is that the suit as against him ought to have been dismissed with costs under Section 260 of the Code of Civil Procedure.

The suit was substantially directed against Kooldeep Narain, the brother of the plaintiffs, who was alleged to be in possession of the entire property to which the plaintiff claims to be jointly entitled with him, although an allegation in the suit was that the purchase, which was made for the joint benefit of all the brothers, had been made in the names of Gour Buksh Loll and Mohadeo Dutt. It seems to me that, in the circumstances of this case, the Court of first instance finding Kooldeep Narain to be described as the principal or substantial defendant, against whom alone the plaintiff sought relief, might have directed the plaint to be amended by the names of the ostensible purchasers, who were made nominal defendants, being struck out. And the suit would then have proceeded against Kooldeep Narain alone, leaving untouched any question which might arise between Kooldeep and Gour Buksh, who was alleged to have been his agent for the purchase, but repudiates that agency, for what reasons we need not now enquire, in which repudiation he is supported by Kooldeep Narain himself But as this step was not taken, and as the ostensible purchasers were brought into Court as defendants, it appears to me that we have no alternative but to order the suit to be dismissed as against them with costs.

In this we follow the decision of the Chief Justice and Mr. Justice Roberts in the case of Mussamut Shuroshutty Dossee *versus* Gopee Soondurce Dossee and others, reported at page 423, Marshall's Reports.

As this ought to have been the decision of the Court below, the defendant Gour Buksh, the present appellant, was clearly entitled to appeal on the matter of costs, and not otherwise.

We therefore decree this appeal as an appeal relating to the costs of those defendants in the Court below, and with costs upon the amount of those costs.

There remains now the point which we reserved yesterday upon the twelfth ground of appeal in Kooldeep Narain's case. He there represents that "when the Principal Sudder Ameen finds in his judgment that one-half of annas 2-10-3 share in Mouzah Futtehpore was, agreeably to the admission of Mohadeo Dutt, purchased with joint and ancestral funds, then your petitioner must have a right in the property decreed in proportion to his share."

It does not appear to us that the appellant is entitled to any part in the share decreed to the plaintiff on the admission of Mohadeo Dutt, because the Court below proceeded upon the belief that Mohadeo Dutt and Gour Buksh had purchased jointly for the plaintiff and Kooldeep Narain. If so, Kooldeep Narain must look for his share of the purchase to his agent; and if, in consequence of the nature of the transactions, he cannot recover his share from the hands of his agent, it is his own concern, and he cannot hope to participate in the share of the plaintiff.

On this point also, therefore, the decree must be against him.

Mitter, J.—I concur.

Miscellaneous Appeals from Midnapore.

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20th April.
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CASES 369 AND 442 OF 1867.

Kooer Narain Roy, *Appellant, versus* Sreenath Mitter, *Respondent.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Appellant.
Baboo Onoocool Chunder Mookerjee for Respondents.

A decree in which two creditors' share is kept alive for one creditor by proceedings taken under it by the other.

These two cases arise out of the execution of one decree. The first appeal is by the execution-creditor, who has an interest in the decree to the extent of 8 annas. The Judge has refused to allow him to execute for that share, upon the ground that no steps had been taken by him, on his own part, within three years next before the present application to execute the decree against the judgment-debtor.

It is admitted that proceedings had been taken within three years by the party who held the other 8 annas share in the decree. Section 20 of Act XIV of 1859 provides:—"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." The Act does not require that the proceeding shall have been taken by the particular party who seeks to execute. It is sufficient if any one interested has taken any proceedings. That has occurred in the present case, and the Judge was in error in not allowing the petitioner to execute, and his decision is therefore set aside with costs and interest.

The other appeal is on the part of the judgment-debtor, who complains that the Judge has allowed execution against him by the other creditor on the strength of an admission made by his vakeel that notice was served upon him on the 14th of September, 1864. He contends, but it is right to say that that contention is very faintly advanced here by Baboo Ashootosh Dhur, who appears for him, that he is not bound by the admission of his pleader. It appears to us that the admission being one of fact, which but for such admission the opposite party would have had an opportunity of proving, the party is bound by the admission of his duly constituted vakeel.

The Judge was right in allowing the execution, and this appeal therefore must be dismissed with costs and interest.

Regular Appeal from Hooghly.

CASE 131 OF 1867.

20th April.

Chuckun Lall Singh, (Plaintiff) *Appellant, versus* Poran Chunder Singh Roy, (Defendant) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Mr. R. T. Allan and *Baboos Mohendro Lall Shome* and *Nilmadhub Sein* for Appellant.
Baboos Onoocool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondent.

The position of the "karta" or manager of a joint Hindoo family is not that of a trustee to the adult members of the family, though it may be so to a minor member.

The plaintiff and defendant are half-brothers, the latter gentleman being of very advanced age, while the former is about forty-five years old. The father of the plaintiff and defendant died as far back as 1235, leaving them his heirs, and from that time till 1271 they lived together in commensality, and in the enjoyment of their property as a joint Hindoo family. The plaintiff was a minor at the time of the father's death, but attained his majority in Bhadro, 1247. In Srabun, 1271, the plaintiff and defendant separated.

In this suit the plaintiff alleges that the defendant managed the family property during the whole period while they, the two brothers, were living in commensality; that with the ready money left by their father, and the surpluses remaining out of the annual profits, after defraying therefrom the

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expenses of the *debshebas*, the charges of the family, and of daily religious ceremonies, real properties have been purchased; that he, the plaintiff, has requested the defendant to let him have the moiety of the accumulation of the surpluses left after such purchases on adjusting of the accounts thereof, as well as half of the existing articles and furniture, and of the money drawn from Court by the defendant subsequent to separation; but he has refused to do so. The plaintiff therefore sues to obtain from the defendant half the ready money and articles left by the father after adjustment of the accounts in respect of the income of real properties and all sorts of expenditures during the managership of the defendant from 1235 to 1270, as well as half the money drawn by the defendant from Court subsequent to the separation."

The substance of the plaintiff's claim is that he seeks to make his brother account to him for and in respect of all the dealings with the family property for a period of thirty-six years, during the whole of which he and his brother had been living in commensality, and enjoying the property jointly in the Hindoo fashion; and he places his right to an account simply on the ground that his brother was all that time "karta" of the family. The claim does, however, divide itself conveniently into three parts, namely, *first*, the claim for account in respect of the period of minority; *second*, the claim for a moiety of certain cash received from another branch of the family by arrangement on a butwarah being effected with it in 1239; and, *third*, the claim for account in respect of the time from 1247 to 1271.

During this last period the plaintiff was admittedly an adult member of the joint family, living in commensality with his brother, and enjoying the joint property to an equal extent with his brother, except so far as the fact that his brother was "karta" made any difference in this respect. Can he, under these circumstances alone, require his brother to furnish him the account he seeks? I think not. If he can, it must be because his brother stood during the period in the position of an agent relatively to him, *viz.*, managed his property for him under some obligation of a fiduciary nature. But I think that this is not the correct representation, generally speaking, of the "karta's" position relative to the adult members of the joint family. It appears to me that the joint family is, as regards the enjoyment of the joint property, a single entity. As long as the members who have, whatmay be termed, vested interests in the property. choose to continue in a state of commensality, and in joint fruition and enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right other than the right to call for partition,—a right which they may alienate. For proprietary purposes, they exist as a whole, somewhat in the character of a corporation. They manage the property together, and the "karta" is but the mouthpiece of the body chosen, and capable of being changed by themselves. The family may in this respect be likened to a Committee with the "karta" as Chairman. No doubt, in practice, the members of the family often do leave pretty nearly everything in the hands of the "karta," and under his control; but this is in most cases the result of the respect which seniority in age and generation is apt everywhere to engender, and more especially in the case of a Hindoo joint family. When it takes place, it is a willing abdication of personal care and supervision; it is not a distinct agency or delegation of a separate authority. Each member may still at all times interfere if he chooses; and he may always insist upon division if he is dissatisfied with the management. Even where the members of the family apparently have the most unrestricted power in the hands of the "karta," it is, I believe, usual to hold a family conclave at least once in the year to confirm and approve of what the "karta" has done, and to discuss jointly what should be done hereafter as to the family affairs. I think therefore that, unless something is shown to the contrary, every adult member of an undivided joint family, living in commensality with the "karta," must be taken, as between himself and the "karta," to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot, without further

cause, call the "karta" to account for it. Of course it may, as a matter of fact, be the case in a given family that the "karta" is the agent of, or stands in a fiduciary and accountable relation to, one or more of the members. It would be easy to imagine a state of things under which he had become the trustee of the property relative to his adult coparcener, or in which, by reason of his fraud or other behaviour, they, some or one of them, had acquired an equity to call upon him for an account. All that I desire to say is that, in my judgment, he does not wear this character of accountability, merely because he occupies the position of "karta." And in the case before us there is not only an absence of evidence tending to show that the defendant was, relative to the plaintiff, anything other than an ordinary "karta" of a joint family living in commensality, but there is, on the other hand, ample to satisfy me that the plaintiff, now a man of mature age, has of late years, at any rate, taken an active part conjointly with his brother, the defendant, in the management of the joint property. I am therefore of opinion that the plaintiff has not established any ground for making the defendant account to him in respect of dealings with, and the proceeds of, the joint property for the period which elapsed between the date when the plaintiff attained his majority in 1247, to the date of separation of the two brothers in 1271.

As to the moiety of the cash received by the defendant, which the plaintiff claims, I cannot say that the Lower Court is wrong in concluding from the evidence on the record that it has been paid for the plaintiff's use, under circumstances which entitle the defendant to set-off that payment against the plaintiff's claim. The defendant says that he applied it to the discharge of the plaintiff's share of liability for Government revenue, which seems to be the fact, and there is nothing to show that this statement is not correct.

There remains the claim for account of the defendant's management of the property from the death of the father to the expiration of the plaintiff's minority in 1247. During this period the plaintiff was disqualified from taking any part in the management of the property, and the defendant was, I think, under the circumstances of the case, in the position of a trustee for him of the joint property to the extent to which he was entitled to share in it. When, therefore, the plaintiff attained his majority, and the trusteeship ceased, the defendant was clearly liable to account to him. But I think the plaintiff was bound, if he desired this account, to seek it within a reasonable time; and I am clearly of opinion that it is too late for him to ask for it now. Immediately upon becoming major, he entered into personal enjoyment of the property jointly with his brother. He has all along had ample opportunities for ascertaining its condition, and of learning how it had been treated during his minority. For twenty-four or twenty-five years he had all the books and papers of the estate within his reach, and yet, from 1247 to 1271, he never once intimated that he held the past accounts still open between himself and his brother. After having so long, with the fullest means of knowledge, slept over his rights, he cannot now be allowed to assert them against his brother. He cannot now, without new reason, call upon his brother to account for the condition of the subject of trust, as it was delivered to his own hands, so to speak, twenty-five years before suit. It is said, however, that the trust, which commenced with the minority, has continued till the present time, and that the plaintiff has never, in the matter of the joint property, been other than the *cestuique* trust of his elder brother. I have already said that although, as a matter of fact, this might well enough have been the case, still the evidence on the record convinces me that the plaintiff did, on attaining his majority, enter into full enjoyment of the joint property as an adult member of the joint family with entire knowledge of his rights. There is no suggestion of any special arrangement between him and his brother for the continuing of the former fiduciary relation, and I am of opinion that the plaintiff did at once, on the expiration of his minority, assume the status, and exercise the power of coparcener in the joint property, living in commensality with the defendant.

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On the whole, it appears to me, considering the facts of the case, that this suit ought to be dismissed with costs.

Bayley, J.—I concur in thinking that the suit should be dismissed. In this case the whole evidence shows that plaintiff was merely one of a joint Hindoo family, and that the "karta" was not agent or trustee, but the selected head of the joint family for the purposes of joint management. The usual means available in such circumstances of consultation, supervision, and investigation being open to the plaintiff, and after plaintiff's majority there was no reason why he should not have before demanded an account. Nor is it at all shown that he himself did not take part in the joint management on his own joint account.

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27th April.

Miscellaneous Appeal from Shahabad.

Baboo Soorj Buksh Singh, *Appellant, versus* Sree Kissen Dass, *Respondent.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboo Kalee Kissen Sein for Appellant.
Baboo Otool Chunder Mookerjee for Respondent.

No interest can be allowed on the difference between the bid of a defaulting auction-purchaser, and the sum for which the tenure is ultimately sold, though the difference itself may be recovered.

We think the order made in this case did not provide for any levy of interest. But we think that we should go further and state that, in our opinion, the law under which the principal amount is levied in this case does not allow the levy of interest. The last Clause of Section 254 of the Code of Civil Procedure runs as follows:—"If the proceeds of the sale, which is eventually consummated, be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court."

It was apparently the intention of the Legislature that the party entitled should proceed to levy this amount immediately. It was not intended that the amount of difference should remain, as it were, as an investment with interest at 12 per cent., and the law accordingly allows that that difference, and that only, shall be levied.

It may be urged that the defaulting purchaser may delay payment by means of vexatious appeals; and it seems that an appeal was allowed, under the Section, in this very case.

We should have been inclined to think, but for the authority of the decision in the appeal in question, that no appeal lay in this case, the parties not being parties to the suit. But in the case which is reported at page 126, VI Weekly Reporter, it seems that the appeal was allowed. Whether it was or was not right to allow the appeal, the law seems to us to contemplate nothing beyond the levy of the actual difference, and interest cannot be allowed.

This appeal is therefore dismissed with costs.

CASE 1472 OF 1867.

6th May.

Special Appeal from Dacca.

Shaikh Koodoottoollah, (Plaintiff) *Appellant, versus* Baboo Mohinee Mohun Shaha and others, (Defendants) *Respondents.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Mr. R. E. Twidale for Appellant.
Baboo Chunder Madhub Ghose for Respondents.

Decisions of local Courts, where not conflicting, may be good proof of local custom.

In this case there must be an order of remand.

The suit was by a Mahomedan against a Hindoo purchaser to enforce the right of pre-emption, the vendor being a Mahomedan. The suit was one in the Lower Court. The plaintiff, in order to prove that the custom of pre-emption prevailed in that locality, adduced several decisions, or, more precisely speaking, three decisions of the several Courts in one case, a decision of the Appel-

late Court of the district in a second, a decision of the Moonsiff's Court in a third, and one of the Sudder Ameen in a fourth case. These decisions all went to show that the custom of pre-emption exists in the locality, and there were no decisions produced to the contrary effect.

On this the Judge says:—"The only evidence which the appellant has produced on this point is two or three decisions of the Zillah Court. Evidence exactly similar to this was held to be quite insufficient to establish the existence of such a custom in the case noted in the margin."

Indro Narain Chowdhry *versus* Mahomed Nuzeerooddeen. Sutherland, I, page 234.

From this it seems to me clear that the Judge understood the High Court to have ruled that the production of two or three decisions of a Zillah Court would not be sufficient in law to establish the custom of pre-emption in a given locality, and he thinks himself bound to hold to the same effect in the present case. In the case referred to in I Weekly Reporter, page 234, the judgment ends as follows:—"Conflicting decisions of the subordinate Courts, however, cannot be held as establishing the custom, and in the absence of any other evidence in which we can take it as proved, the decisions of the Lower Courts must be reversed, and the plaintiff's suit must be dismissed."

And further back:—"But he (plaintiff) only put in three decisions of inferior Courts to show that the custom does prevail at Chittagong, while the defendant put in at least one decision, also of a subordinate Court, showing that the custom of the right of pre-emption amongst Hindoos of Chittagong does *not* prevail."

It is clear therefore that the Court only meant to say in that case that it could not be held, upon decisions which were in conflict with other decisions of the same district, that the custom of pre-emption prevailed in that district. They did not say that when there were decisions tending the same way, that that would not be a satisfactory proof of the fact.

I am not prepared to say whether the decisions produced in this case were sufficient to prove the custom or not. It may be that, if they were all suits between the parties residing in the locality in which the parties to the present suit reside, and if the decisions judicially recognized the custom, and were not appealed from, or were confirmed on appeal, they would be sufficient to establish that the custom did prevail in such locality. But if the parties are from other localities, such decision might or might not bear upon the custom. There must be a remand, the decision complained of being set aside.

The Judge must exercise his judicial mind, and determine whether, on the evidence adduced, the custom of pre-emption has been proved to exist in the locality in which it is sought to enforce it in the present suit.

Regular Appeal from Hooghly.

CASE 134 OF 1867.
8th May.

Poorno Chunder Roy and others, (Plaintiffs) *Appellants, versus* Mr. H. Balfour, Chairman to the Municipal Commissioners, (Defendant) *Respondent.*

Before *Bayley* and *Phear*, J. J.

Mr. R. T. Allan and *Baboo Ishur Chunder Chuckerbutty* for Appellants.
Baboo Juggodanund Mookerjee for Respondent.

Question as to the amount of protection afforded to Municipal Commissioners by the special limitation Clause of Act III (B. C.) of 1864. Doubtful whether it extends to protect them from a suit for recovery of land wrongfully taken, though brought more than three months after cause of action.

In this case plaintiffs, as proprietors of a ten-sixteenth share of a certain zemindary, sued the Chairman of the Howrah Municipal Committee to recover possession, with mesne profits, of 1 beegah 17½ cottahs of land, from which 13-15½ chittacks were to be deducted on account of the six-sixteenth share.

Plaintiffs alleged 15 cottahs to be part of their ancestral land, and the rest to be chur land accreted contiguous to their zemindary, and resumed by Government as a chur, and settled with the predecessors of plaintiffs and others. Plaintiffs alleged they held possession, and that defendants had ousted them by stacking stones on 1 beegah 2½ cottahs thereof, and that the cause of action arose on the 7th December, 1865, when the Commissioners refused to remove the stones, referring plaintiffs to their legal remedy, if so advised.

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The defendant's case was that the land had all along been in possession of Government till Act III of 1864, Bengal Code, was extended to Howrah, *viz.*, on the 1st May, 1865; that the Municipal Commissioners had always since then held the lands; that plaintiffs were therefore barred under Section 87, Act III of 1864; that the cause of action could not be taken as from the date of the letter of 7th December, 1865; that the Government had held the land for twelve years adversely to plaintiff, and thus also plaintiffs were barred by the general law of limitation; and that the land was part of the public road, and therefore, under Section 10 of Act III of 1864, the rightful property of the Municipal Commissioners; lastly, that the mesne profits were over-estimated.

The Lower Court's finding is this:—"I find that the cause of action must be reckoned to have accrued on the date of ouster, and that a suit must be brought within three months of the said date of ouster. It is amply proved by the evidence of defendant's independent and trustworthy witnesses, residing very close to the disputed land, that the said land was a part of the former public road; that a portion of the said road was taken up from the new road subsequently prepared; that the remaining portion of the former road, which forms the subject of this suit, was in the possession of the Government; that after the Municipal Act had come into operation, a toll house was erected, and stones, &c., for metalling the public road were stacked in it; and that the said Committee have held possession of it from a long time. Such being the case, I am of opinion that the special limitation provided in Section 87 aforesaid applies to the plaintiffs' suit. Besides, it is proved by the plaintiffs' witnesses that they have been out of possession of the disputed land since Bhadro, 1272. The plaint was filed on the 24th Falgoon following, *i. e.*, after lapse of upwards of three months. Consequently the suit can by no means be saved from the operation of limitation."

The Lower Courts on these facts held that Section 87, Act III of 1864, barred plaintiffs, and that defendants were not trespassers.

The plaintiffs' suit being accordingly dismissed, they appeal, and urge that the cause of action must be taken to be the refusal of the Municipal Commissioners to remove the stones, first conveyed in their letter of the 7th December, 1865, and that consequently plaintiffs are not barred by Section 87, Act III of 1864. Further, that this was a case of possession by plaintiffs, and illegal dispossession of them by defendants, to which no special law of limitation would apply; and lastly, that their right and possession of the land was fully proved, and so no general law of limitation would apply.

I am clearly of opinion that the letter of the 7th December, 1865, cannot be properly considered (as urged by plaintiffs) to be the cause of action.

But the question whether Section 87, Act III of 1864, applies, depends upon whether the Act itself applies; that is, whether the Commissioners had warrant for acting as if in rightful possession of the land, and are therefore protected by the Act. This again depends on the evidence as to their possession, and its being a rightful possession. After hearing all the evidence in the case, I think it is sufficiently shown that the land in question has for more than twelve years been in the possession of Government as part of the public road-way at, and was the public ghat, and that the Municipal Commissioners, under Act III of 1864, succeeded Government in the right which Government held. In this view, I consider the Municipal Commissioners properly acted under the law cited, and I would therefore consider them entitled to the application of Section 87, if the cause of action is of such a date as to bar the plaintiffs. The cause of action not being, in my view, the letter of 7th December, 1865, which is simply one in reply to plaintiffs' attorney in the ordinary course of business, there is no further contention on that point that Section 87 would not then apply.

On the whole, I think plaintiffs' suit should be dismissed with costs.

Phear, J.—Assuming that the plaintiffs have by their evidence established the cause of action upon which they sue, I think, on the other hand, that it is sufficiently clear, from the evidence in the case, that the defendants com-

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mitted the wrongs with which they are charged in the reasonable belief that they were exercising the powers conferred upon them by Act III of 1864 (B. C.), and therefore, if the plaintiffs were in this action strictly suing them for damages consequent on that wrong, I should consider that the defendants were entitled to invoke the protection provided by Section 87 of Act III of 1864. But, on turning to the facts of the case, I doubt whether those facts would support the defendant's claim in this respect, because I think the keeping the plaintiffs out of possession would be a continuing wrong-doing, and therefore that, as regards the cause of action afforded by the latter part of the defendants' wrongful conduct, the plaintiffs' suit was in time.

However, on the whole merits of the case, I think that the plaintiffs are substantially suing to recover possession of property which they say is kept away from them by the defendants, and I am not prepared to say that Section 87 is intended to apply to such a case as this. I should hesitate, long before coming to the conclusion, that the Legislature meant by enacting this Section to give the Municipal Commissioners the power, except a suit was brought against them within three months, to retain property against the rightful owner, merely because they, the Commissioners, had taken it in the first instance in the honest though mistaken belief that they were right in so doing. I think it more reasonable to suppose that the Section, as its words imply, was directed solely to the cases of suits brought against the Commissioners for damages consequential on the act done by them which is complained of.

But, whatever be the correct view of the Section, I am not satisfied, on the best consideration which I have been able to give to the evidence, that the plaintiffs have even established a *primâ facie* claim to the plot of land which they seek to recover. I am therefore prepared to concur in the decree proposed by Mr. Justice Bayley.

Special Appeal from Tipperah.

CASE 2016 OF 1867.

8th May.

Amjed Ali, (Plaintiff) *Appellant, versus* Ala Buksh, Defendant) *Respondent.*

Before *Bayley* and *Macpherson*, J. J.

Baboos Chunder Madhub Ghose and *Sreenath Dass* for Appellant.
Moulvie Murhamut Hossein and *Baboo Romanath Bose* for Respondent.

Under the Registration Act of 1864, the provision for compulsory registration of leases does not affect a "kabooleut" which cannot be included in the term "lease," unless expressly defined to be so.

The appellant relied on a kabooleut, which he alleged had been executed by the defendants. But the Lower Appellate Court held that the kabooleut could not be received in evidence, as it had not been registered, and as it was a document which, in the opinion of the Court, required to be registered (under Section 13 of Act XVI of 1864) before it could be received in evidence in a Civil Court. The Judge ruled that the word "lease" in Section 13 of Act XVI of 1864 includes a "kabooleut," as it does in the new Registration Act XX of 1866 (by reason of the definition of the word "lease" contained in Section 2 of the latter Act).

The appellant contends that the Lower Court was wrong in holding that the kabooleut could not be received because unregistered; and, further, that, even without the kabooleut, there was sufficient evidence before the Court to entitle him to a decree.

We think that the Judge was wrong in holding that a kabooleut is a lease within the meaning of Section 13 of Act XVI of 1864. A kabooleut is often a mere counterpart of a lease; but it is not necessarily a counterpart. Moreover, as a counterpart of a thing is not the thing itself, a counterpart of a lease is *primâ facie* not a lease. The Registration Act, as excluding certain documents from evidence, must be construed strictly; and had we nothing but the mere words used in the Act to guide us, we should say that "lease" does not include "kabooleut."

This view, however, is corroborated by the fact that, in the Stamp Act, X of 1862, we find the Legislature treating a "lease" as one thing, and a "kabooleut"

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as another. "Leases" are dealt with in Article 39 of Schedule A, while the "kabooleuts" are dealt with as "counterparts of leases" in Article 33. Again, in the new Registration Act XX of 1866, Section 2, "lease" is defined as including a "counterpart;" a "kabooleut", "an undertaking to cultivate," &c. The Judge uses this as an argument to show that "lease," as used in the old Registration Act, also included "kabooleut." But it seems to us to be an argument the other way? for if the words of the old law sufficed to include "kabooleuts," what need was there for a Clause in the new law expressly declaring that it did include it. Finally, we find that in the Rules published under the Act by the Registrar General, "kabooleuts" were treated as not included in the term "lease." These rules have (under Section 64) the same force as if inserted in the Act.

We have no doubt that the construction put upon the word "lease" by the Judge below is wrong. We therefore reverse his decision, and remand the case to him for trial on the merits.

We make the like order in the appeals Nos. 2018 and 2019, which turn on a precisely similar point.

CASES 594 AND 595 OF 1867.

8th May.

Miscellaneous Appeals from Rangoon.

Mr. James Cotton and another, *Appellants, versus* the Pegu Saw Mills Company, *Respondents.*

Before *Loch* and *Hobhouse*, J. J.

The Advocate-General and *Messrs. H. A. Gray* and *Cowie*, and *Baboo Romanath Bose* for Appellants.

Mr. R. V. Doyne for Respondents.

The fact that appellants had entered their names in the prospectus of a Company for a certain number of shares, indicates merely an *intention* on their part to become shareholders, and does not, of itself, make them contributories. Their subsequent refusal to take shares, or to agree to registration, severs their connection with the Company.

Hobhouse, J.—The papers on the record before us show that some time in June of the year 1865 a Company, styled the "Pegu Saw Mills Company, Limited," was projected.

We have not the prospectus nor the names of all the projectors before us; but it is admitted by the learned Advocate-General, on behalf of the appellants, that these persons signed the prospectus, and were amongst the projectors of the Company; that they entered their names in a list which was attached to the prospectus as intending shareholders in the Company, each to the extent of ten shares of Rupees 500, representing in each case an intended contribution of Rupees 5,000; and that their names were entered as such shareholders in the registration made of the Company under the provisions of Act X of 1866.

These preliminary facts admitted, it next appears on the records that, on the 19th January, 1867, certain contributors (amongst whom appellants were not) and creditors of the Company applied, under Section 101, Clauses 4 and 5 of Act X of 1866, to the learned Recorder of Rangoon to have the Company wound up under an official liquidator, on the ground that large debts had been incurred on behalf of the Company, which the Company was unable to meet, by reason that a large number of contributories to the Company had refused to pay up the calls due on their shares.

On the 25th February, 1867, the official liquidator was appointed, and on the 11th April following, this gentleman applied to the Court of the learned Recorder, presenting a list, Exhibit A, of contributories to the Company, showing the name of each contributor, and the amount of his contribution, and praying that the Court would call upon each contributor to pay up.

This list contained the names of Cotton and Balthazar, the appellants before us, as shareholders, each to the extent of Rupees 500, and was sworn to be a correct list, as drawn up from the books and papers of the Company.

The application of the official liquidator was entered as a Miscellaneous Civil Suit, No. 23 of 1867, and was heard as such in the presence of appellants on the 11th and 18th May, 1867, and on these two dates respectively the official liquidator swore that the debts of the Company, as by Exhibit B, amounted to Rupees 1,31,284-13-5, and the Official Registrar swore that the

Official Memorandum of the Association of the Company had been duly registered by seven certain shareholders of the Company, amongst whom appellants, it may incidentally be said, were not.

At the hearing of the case, appellants objected that they were not liable as contributories, because they had not signed the Memorandum of Association, nor had they made any application for shares, nor had they received any allotment of shares, nor had they paid any deposit on shares; and, further, because misrepresentations had been made to them as to the position and prospects of the Company.

This last objection, it may here be remarked, is abandoned by the learned Advocate-General in appeal, inasmuch as he admits that appellants did not attempt to establish the fact on which it is based in the Court below.

On the 29th May, 1867, the learned Recorder delivered judgment to the following effect.

He held that, though every formality of law had been neglected in the foundation of the Company, yet that, inasmuch as it had been registered under Section 37 of the Act, it was not an abortive Company, but had been in existence; and as regards appellants, he further held that they had entered their names as shareholders in the prospectus of the 27th February, 1866; that this was equivalent to an application for shares on their part; that they had actively engaged and been treated as shareholders; and that so, whether they were shareholders or not, and whether they were properly described in the register or not, and though no scrip had been issued, and though their acts had not been attended by the requisite formalities, and whether they had subscribed or paid for shares or not, still they were liable to be treated as contributories, and the learned Recorder declared them to be contributories, and directed that a list should be prepared, showing the name of each contributor, and the amount of his liability.

On the 15th June, 1867, the lists were filed before the Court in the presence of all parties, and the appellants before us were declared formally liable; and on the application of the official liquidator, under date the 24th June, 1867, the learned Recorder, under date the 26th June, 1867, directed that appellants should, each of them, pay to the official liquidator, on or before the 8th July, 1867, the sum appearing against his name, *i. e.*, in each case the sum of Rupees 5,000.

Execution was taken out by the official liquidator for the recovery of the said sum, but has apparently been stayed pending appeal.

It is against the judgment and order above mentioned that the appeals before us are preferred, and a preliminary objection is taken by the learned Counsel, Mr. Doyne, for respondent, that no appeal lies to this Court at all.

By Section 27, Act XXI of 1863, it is declared that "in all suits heard and determined by the Recorder (of Rangoon) under this Act, in which the amount or value of the suit shall exceed three thousand rupees, and be less than Rupees 10,000, an appeal shall lie to the High Court of Judicature at Fort William in Bengal."

By Section 119 of the Indian Companies Act, it is enacted that, "as soon as may be, after making an order for winding up the Company, the Court shall settle a list of contributories."

By Section 122 of the same Act, it is enacted that "the Court may at any time, after making an order for winding up the Company, make an order on any contributory for the time being settled in the list of contributories, directing payment to be made of any monies due from him to the Company."

By Section 141 of the same Act, it is enacted that "appeals from any order or decision made or given in the matter of the winding up of a Company by the Court may be had in the same manner, and subject to the same conditions in, and subject to which appeals may be had from any orders or decisions of the same Court in cases within its ordinary jurisdiction."

The appeal in this case is not, as I understand it, an appeal against that

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order of the learned Recorder of the 26th June, 1867, which directed appellants to pay a certain sum to respondent, but is an appeal against that judgment of the learned Recorder of the 29th May, or perhaps of the 15th June, 1867, which determined that appellants were contributories to the Company.

The order directing appellants to pay a certain sum on the particular amounts of their contribution is, in fact, nothing more than a necessary sequence to that judgment which determined that appellants were contributories, and this order must of course stand or fall with the judgment which preceded it; and the only question therefore for us to determine is whether or not that judgment is of the nature of a decision of the Court of the learned Recorder of Rangoon in a suit within the ordinary jurisdiction of that Court, and in a suit in which the amount or value exceeded Rupees 3,000, and was less than Rupees 10,000.

The amount in regard to which the learned Recorder has come to a determination is admittedly, in the case of each appellant, the sum of Rupees 5,000, and the judgment is, in our opinion, in the nature of a decision of the same Court in a case within its ordinary jurisdiction.

There was what was, in fact, and what was treated as a suit by the official liquidator against appellants to have them declared contributories, and to recover certain sums of money, exceeding Rupees 3,000, and not exceeding Rupees 10,000, from them as such contributories, and the Court has heard and determined such suits, and an appeal, therefore, does, in our opinion, under the provision of the law above quoted, lie from the Court's decision.

The question then now is whether appellants are or are not contributories.

Mr. Doyne, for respondents, contends that the Company was not an abortive, but an existing, Company, and that appellants, either by their acts or omissions, constituted themselves contributories to it; that they signed the prospectus, and entered their names in such as shareholders for a specified number of shares; that they were registered as shareholders; that they have allowed their names to remain in such register; that they do not show that their names were registered improperly; and that such registration, following upon the acts of appellants precedent thereto, and not annulled by any acts subsequent thereto, concludes appellants as contributories, appellants having, in fact, held themselves out to the world as shareholders, and having thus induced the creditors of the Company to advance money on their (appellants') credit.

The learned Counsel did not cite any rulings of the Courts in support of this contention.

On the other hand, the learned Advocate-General contended that appellants were not contributories; that their acts in signing the prospectus, and in entering their names as shareholders for a certain specified number of shares, were evidence merely of an intention to become shareholders, and not of having actually become shareholders; that the registration was not shown to have been effected with their knowledge or assent; that neither did they apply for shares, nor were shares allotted to them; that they paid no deposit, and answered no call; and that, on the contrary, when calls were made, they declined to pay up, pleading non-acceptance of any shares; so that, under numerous rulings of the Courts at home, to which the learned Advocate-General referred at length, his clients could not be considered as contributories under the Act.

The facts appearing on the record seem to us to show conclusively that the Company was not an abortive, but an actually existing, Company,—a Company that was actually formed by an association of individuals; for premises were purchased, works were set up, shares or calls thereon were paid up, registration, *i. e.*, incorporation, was duly effected, the Company was at work for about two years, and on the credit of the business, and of the shareholders, monies were lent, and debts incurred to the extent of something over Rupees 1,31,000.

The Company then was not, in our opinion, what is technically called an abortive Company. And then the facts that are admitted on either side are these, *viz.*, that appellants signed the prospectus, signed on that prospectus their names as shareholders, each for a specified number of shares, were registered as such shareholders, and made no attempt to expunge such registration; but that, on the other hand, appellants were not cognizant of, and did not assent to, such registration that no shares were accepted by them; that no deposits were made by them; that they refused to accept shares, or to pay calls on shares; and that though they took a part in setting up, they took no part at all in the business of the Company.

It is upon these facts that the question of contributorship, or the contrary arises, and has to be determined.

Sections 6, 11, 18, 22, 36, and 37 of the Companies Act, read together, seem to me to declare that every person whose name has been duly registered as a shareholder of a Company, and whose name is on the Register at the time of winding up, is a present member of the Company, who has, until the contrary is shown, agreed to be a member, and who is therefore liable as a member to contribute to assets to an amount sufficient to pay the debts and liabilities of the Company, &c.

But this liability is *primâ facie* liability only, and it is, it seems to me, at all times open to a registered member to show that though his name is in the Register, yet that, in fact, he did not agree to become a member of the Company.

Now, in the case before us, Mr. Doyne, for respondents, contends that appellants did agree to become members when they signed the prospectus, and entered their names thereon as shareholders for specified shares.

But the learned Advocate-General, for appellant, contends that this was no agreement, but only an expression of an intention towards such agreement; and that the facts of the non-acceptance and non-delivery of shares, of the non-payment of calls or deposits, and of the not taking any part in the business of the Company, are evidence in law of the non-existence of any agreement of membership, and so of non-contributorship.

After giving the best attention in my power to this point of law, and consulting the authorities upon it, I think that the weight of those authorities is with the learned Advocate-General.

I find, in the first instance, no authorities in support of the thesis laid down by the learned Recorder, that the mere entry in a prospectus of a Company of the names of certain persons as intending shareholders is equivalent to an application for shares on the part of such persons, and I do not find on the record any evidence of the fact found by the learned Recorder that the appellants were actively engaged as shareholders of the Company.

And I find, on the contrary, that whilst appellants are not shown to have been cognizant of, much less to have given their assent to, the registration of their names as shareholders; and whilst it is admitted that appellants refused to receive any shares, or to pay up any calls or deposits, and had no shares allotted to them, the only step taken by appellants in the matter of the Company was their joining with others in putting forth the prospectus of the Company, and affixing their names in that prospectus to a certain number of shares; and the facts being so, I think that appellants cannot be said to have agreed to become members of the Company, and so are not contributories.

The learned Recorder has relied on certain doctrines which are to be found in Lindley's Treatise on the Law of Partnership, and they are these. On the subject of contributories, the learned author remarks (Edition 1863) as follows:—"Those," he writes, "who, when a petition for the winding up of a Company is presented, are shareholders in that Company, or are estopped from denying that they are so, are also contributories in it, unless they can show good reason to the contrary. It is wholly immaterial whether they are or are not properly described in the Company's Register as shareholders, or

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whether they are or are not shareholders in the strict sense of the term and as such liable to creditors," page 1087.

And again :—" These cases are sufficient to show that where a person has acted and been treated as a shareholder, he will be a contributory, notwithstanding the non-observance of these formalities, which, according to the strict letter of the Company's deed, must be complied with before a person is entitled to share profits, or enjoy the other rights or privileges of a shareholder," page 1089.

And again :—" It follows from the definition of the word 'contributory' that it is by no means essential that a person should be, or ever have been, a shareholder in order that he may be a contributory. If he is bound to the Company to take shares in it, that is sufficient to fix him as a contributory," page 1111.

And again :—" From a review of the cases relating to the winding up of an abortive Company, it therefore appears, *first*, that if persons are actively engaged in forming a Company, if they act as a body, and as a body incur debts for which they are all liable, if not directly, at all events as between each other, then they form a Company or Association which may be wound up, and on its winding up they will be contributories, whether they have actually subscribed for shares or not.

" *Second.*—That persons who, without being actually engaged in forming a company, agree not only to take shares in it, but also to share the expenses incurred in forming the Company, are, in its winding up, liable to be made contributories.

" *Third.*—That persons who agree to take shares in a Company in the process of formation, and afterwards formed as projected, are, in the winding up of that Company, liable to be made contributories, although they never actually became shareholders in it," pages 1123 and 1124.

These are the passages in Lindley on which the learned Recorder relies, though he has not quoted them so much at length.

I will first take the two passages in pages 1087 and 1089, and, for the purposes of the argument, I will assume that appellants " are shareholders, or are estopped from denying that they are so;" but I would then remark that the shareholders will, in the words of the learned author, yet only be contributories, until they can show good reason to the contrary.

I then remark that in all the cases cited in pages 1088 to 1090, the shareholders who were held to be contributories had gone far beyond the present appellants in their acts; they had bought shares, had had those shares transferred to them, had paid up, and had received dividends on them as in Strafford Saunderson and Gordon's cases, or they had availed themselves of the privileges of the Company as in Maquire's case; so that, even assuming appellants to have been shareholders, I think that the doctrines laid down by Lindley at pages 1087 and 1089 have no application.

I will next examine the doctrines, to be found at pages 1111 and 1123, and I will assume, for the purposes of the argument in this case, that the doctrine applied at page 1123 to abortive Companies applies also to Companies such as this before us, which was a completely formed Company, and the doctrines seem to me to turn wholly on the fact as to whether or not the person sought to be made a contributory was or was not bound to take shares, and did or did not agree to take such shares.

And here again I find that, in all the cases cited by Lindley, the persons who were held to be contributories went far beyond the present appellants in their acts. They applied for, paid up for, and were allotted shares, as in Gelland, Hawkin, Blackborne, Sharper, and Mansfield's cases, or applied only for shares as in Burton's case; or agreed to take them as in Bard's case (pages 1111 and 1113); or they agreed to share expenses, paid expenses, accepted shares, or agreed to take them as in the cases cited at pages 1121 to 1123.

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So that, here again, I am of opinion that the doctrines relied on by the learned Recorder have no applicability to the case before us.

Having thus disposed of the grounds on which the learned Recorder found appellants liable as contributors, I believe I can state, in a very few words, my own reasons for considering that appellants are not contributories.

I find that appellants' names were, and are still, entered in the Register of Members of the Company, and I think, as I have indicated above, that appellants must, by reason of this entry, be deemed to be members, unless and until they show that they are not shareholders.

It is then contended that appellants are not shareholders, because, although they signed the prospectus, they did, in fact, refuse to become, and did not become, shareholders, inasmuch as admittedly they refused to accept any shares, or to pay any calls or deposits, and had no shares allotted to them.

The mere putting forth of a prospectus, and affixing their names as intending shareholders, cannot, in my opinion, as contended for by Mr. Doyne for respondent, be construed into an agreement entered into by appellants to take shares; and it is quite clear, I think, as I have shown above, that appellants are not shareholders within the meaning of Lindley's definition and precedents at pages 1087 to 1089 of his book, or persons who, without being shareholders, are yet bound to take shares within the principles and precedents cited by Lindley at pages 1111 to 1113.

But I think this case may be carried further, and that, under the cases quoted by Lindley at page 1114 *et seq.*, appellants clearly cannot be held to be contributories.

In these cases shares were applied for, and allotted as in Mathew's case, and an active part taken in getting up the Company as in Macmichael's case, and yet the persons were held not to be contributories; and it seems to me to follow, that if persons were held not to be contributories who had gone so far in their acts as above mentioned, much less can these persons be held to be contributories, who have never gone so far in their acts, who made no application for shares, who received no allotment of shares, who took no active part in getting up the Company, and who, on the contrary, refused to accept shares, or to pay up any calls or deposits on them.

I am of opinion, therefore, that the judgment of the Court below should be set aside, and that appellants should be released from contributorship, with costs in this Court and in the Court below.

Loch, J.—I concur.

Miscellaneous Appeal from Cuttack.

CASE 36 OF 1868.

8th May.

Baboo Brijnath Pundit, (Decree-holder) *Appellant, versus* Kunhya Loll Pundit, (Judgment-debtor) *Respondent.*

Before *Phear* and *Hobhouse*, J. J.

Baboos Hem Chunder Banerjee and *Obhoychurn Bose* for Appellant.
Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Respondent.

Question raised as to whether a Court executing a decree ought not, on a *second* application for execution, to enquire *why* the first proceedings had not satisfied the decree.

Phear, J.—In this case the decree was passed on the 16th August, 1861. The first application for execution was made on the 18th of June, 1864, two years and ten months after the decree was obtained. The notice of the application for execution was served upon the defendants on the 22nd of January, 1865, and it is possible that the delay between June 1864 and January 1865 may have been the fault of the Court, and not attributable to laches or want of diligence on the part of the plaintiff; but after the service of notice on 22nd January, 1865, the plaintiff took no further steps whatever, and his execution case was struck off on the 4th March, 1865. From that time until the 8th July, 1867, another long interval of two years and four months, nothing was done by the judgment-creditor, but on that day the present application for execution was made. The Lower Court refused to grant that application, holding that

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8th May.
CIVIL JURISDICTION.

the intermediate application of the 18th of June, 1864, followed only by service of notice on 22nd January, 1865, was not a *bonâ fide* proceeding which would have the effect of keeping the decree alive under the provisions of Section 20, Act XIV of 1859.

This is a regular appeal against that decision, and I must say that I see no reason at all for disturbing the finding of fact at which the Lower Court has arrived. The intervals between the decree and the first application for execution on the one side, and between the striking off of that execution case and the second application for execution on the other side, are both, to my mind, very material facts bearing upon the *bonâ fide* of that application itself. There are other facts referred to by the Lower Court; and, on the whole, it comes to the conclusion that the application of June, 1864, was a pretence only, and not a *bonâ fide* proceeding within the terms of the Act. In that conclusion I concur. It follows that this present appeal will be dismissed.

But I wish to add one or two words expressive of my opinion with regard to another phase of the case, in which I believe my learned brother is not at present prepared to concur. It seems to me that, under the Procedure Act—Act VIII of 1859—although the Court is bound to issue process of execution of one sort or the other, when first the execution-creditor makes application in due form for execution, and shows that everything has occurred to entitle him to it in the mode prescribed by the Act, still I do not think that when the Court has once granted an application of this kind, it is bound, upon the second application of the same judgment-creditor, to grant that second application as a matter of course. I think it is specially incumbent upon all Courts charged with the execution of decrees to take care that their proceedings and processes are not abused, and there is probably no process or proceeding of Court in regard to which it is necessary to be more attentive in order to prevent abuse than the process of execution. I think that, except in the first instance, when, no doubt, the Court is obliged to grant the application of the judgment-creditor, in the other cases it ought always to require of him to show why the steps previously taken by him in execution had not led to a full discharge of the debt. And unless the judgment-creditor should satisfy the Court that the failure of those proceedings to bring about execution of the decree was not attributable to his own fault, the Court ought not, I think, to grant its process a second time. With these views, I think that, in the present case, the Lower Court would have been perfectly right to have dismissed this application for execution, upon the single ground that the decree itself was one which was six years old; that proceedings in execution had been taken by the creditor some two years and a half before the present application; and that he in no way accounted for those proceedings not having been carried to a fruitful result, or showed why the decree was not yet satisfied.

Hobhouse, J.—I agree with my learned brother Phear in thinking that the proceeding of the 22nd January, 1865, was not, for the reasons given by him, and by the Court below, a *bonâ fide* proceeding. I think therefore that the judgment of the Court below was right when it refused execution in this case. I think therefore that that judgment must be confirmed, and this appeal dismissed with costs. I am not prepared to give any opinion upon the subject discussed in the second part of my brother Phear's judgment. I do not think that that subject necessarily arises in this particular case.

Miscellaneous Appeal from Moorshedabad.

1868.

11*th May.*
CIVIL JURISDICTION.

CASE 40 OF 1868.

Ram Dyal Gooye, *Plaintiff, versus* **Amrit Lall Khamaroo,** *Respondent.*

Before *Loch* and *Glover*, J. J.

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellant.
Baboo Nilmonee Sein for Respondent.

The Judge cannot call on the guardians of a minor, while still in office, for accounts, and cancel their certificate for recusancy. Such accounts can only be recovered from the guardians by regular suit instituted by friends or relations of the minor. On proof of waste, the Judge may dismiss guardians summarily, without calling for accounts, and he may call for accounts from a guardian after dismissal.

This was an application by one Amrit Lall Khamaroo for a certificate under Act XL of 1858, on the allegation that the appointed guardians, Ram Dyal and Mussamut Brojo Soonduree, had neglected their charge in various specified ways.

On receiving the application, the Judge appears to have called upon the guardians to produce their accounts, and, on their failing to do so, took away their certificate, which he granted on the same day to Amrit Lall.

The original guardians now appeal.

The Judge does not state under what Section of the Act he proceeded; and it appears to us that there is no Section under which he could have called on Ram Dyal and Brojo Soonduree to produce their accounts, so long as they remained in the office of guardians.

It has been suggested by counsel that he proceeded under Section 19 of the Act; but Section 19 refers to third parties, relatives or friends of a minor, wishing to force a guardian to give in his accounts; and, moreover, that Section provides that, for such a purpose, a regular suit must be instituted by the relative or friend in question, a simple application for such purpose not being sufficient. The Full Bench decision in the case of Nanee Bibee *versus* Khajah Surwar Hossein, IV Wyman's Reporter, page 16, has ruled this point.

The only Section under which the Judge could have acted, if he thought that the guardians had neglected their trust, was Section 21. By that Section he would have been justified in summarily cancelling the guardian's certificate if waste were proved, or any other sufficient cause shown; but the Section gave him no authority to call upon Ram Dyal and Brojo Soonduree, while still guardians of the minor, for accounts, or to make their neglect to file them, a reason for cancelling their certificate. The accounts which a Judge can call for under Section 21 are those which are to be furnished by a discharged guardian to his successor in office, and not those in the hands of a guardian who still retains his office.

The only way in which such a guardian can be made to furnish such accounts is by a regular suit brought against him by some relative or friend of the minor. A Judge has, it seems to us, no power to demand them.

The case must therefore be remanded, in order that the Judge, before cancelling the certificates of the original guardians, may take evidence as to the negligence and waste alleged against them, and decide whether there is "sufficient cause" for his interference. If he consider that there is such sufficient cause, he can cancel the certificates at once without calling for accounts.

But before appointing Amrit Lall Khamaroo, who appears to be a man of low caste and position, and is alleged to be illiterate and incapable, the Judge should satisfy himself, with reference to Section 9 of the Act, as to the proposed guardian's fitness for the office he wishes to undertake.

1868.

13th May.
CIVIL JURISDICTION.

CASE 506 OF 1867.

Miscellaneous Appeal from Backergunge.

Rajah Shuttochurn Ghosal, *Appellant*, *versus* Bhyrub Chunder Brohmo, *Respondent*.

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboos Obhoy Churn Bose and *Hemchunder Banerjee* for Appellant.
Baboo Gopaul Loll Mitter for Respondent.

Difference of opinion as to whether there is any practical distinction between a proceeding keeping a decree in force, and a proceeding for actually enforcing it.

Held, by the Senior Judge, that no mere order of the Court restoring an execution case to the file is of avail to extend limitation, unless the decree-holder take some active steps, evidencing his *bonâ-fide* intention to carry out the execution.

Mitter, J.—I am of opinion that this decree is not barred by the provisions of Section 20, Act XIV of 1859. It appears that an order was passed by the Court for restoring the execution case to the file within three years next before the date of the last application. I think that this order is a proceeding for keeping the decree in force, although it is not a proceeding for enforcing it. I think that the Legislature, when it referred to proceedings of both these descriptions, intended to draw some distinction between them. A warrant for the arrest of the person of the judgment-debtor, or a process of attachment issued against his property, is a proceeding of the latter class, but an order for the restoration of an execution case to the file, and which thereby directs the execution to be proceeded with, is a proceeding of the first-mentioned class; *i. e.*, it is a proceeding for keeping the decree in force. It has been decided that an order striking off an execution case from the file is not a proceeding within the meaning of Section 20, but the proceeding before us is of an opposite character. Nor can such a proceeding be impugned on the ground of want of *bona fides*, for it is an act of the Court itself. It has been already decided by a Full Bench that an act of the Court cannot be impugned as *mala fide*, and I think that the same principle ought to be applied to the proceeding before us. I would therefore reverse the decision of the Lower Courts, and remand this case to the Court of first instance. The respondent ought to pay the costs incurred by the appellant, both here and in the two Lower Courts.

Loch, J.—I cannot concur in the view taken by my colleague. There can of course be no question of the *bona fides* of the order of the Court ordering the application for execution to be registered, and directing the party to proceed with the execution. But what we have to look to is the *bona fides* of the party making the application. In making it, did he intend to carry out execution? Did he intend to take further steps to realize the debt due to him? If there is no valid objection to proceeding with the execution apparent on the face of the application, the Court cannot refuse to admit it on the register; but by so doing, it does not guarantee that the decree-holder is acting in good faith. Where a notice is served though the Court, or other process issued at the instance of the decree-holder, means of judging of his good faith in applying for execution are afforded, but the order of the Court merely restoring an execution case to the file, or directing a fresh application to be registered, does not, in my opinion, assist the applicant at all. The petition filed, and the order to proceed passed thereon, are merely acts to start the case; but if it be proceeded with no further, that order will be no better protection against limitation than the petition upon which it was passed.

The decree in this case was passed in 1850, and was alive in 1859, when Act XIV of that year was passed. Something appears to have been done in August, 1860; but from that date to 25th April, 1861, nothing effective in furtherance of execution was done. Petitions for execution were put in on 4th May, 1861, and 14th August, 1862, and the usual order passed upon them, and they were struck off for default, no steps having been taken by the decree-holder to carry out execution. On the application of 25th April, 1864, notice was served on the debtor, but by that time execution was barred by limitation, and it has been ruled by this Court that where limitation has once operated to prevent execution, no subsequent acts of the decree-holder can restore to him the right once lost of executing his decree. Under these circumstances, I would confirm the orders of the Lower Court, and dismiss this appeal with costs.

Special Appeal from Beerbhoom.

1868.

27th April.
CIVIL JURISDICTION.
RENT SUITS.

CASE 2114 OF 1867.

Sreemuttee Sreemunjooree Dassee, (Plaintiff) *Appellant*, *versus* Poorusuttom Dass and others, (Defendants) *Respondents.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Jugodanund Mookerjee and *Umurnath Bose* for Appellant.
Baboo Kishen Kishore Ghose, *Ashootosh Chatterjee*, and *Greeja Sunkur Moozoomdar* for Respondents.

A and B enter into an arrangement to work certain mines in A's land. A is, it is arranged, to receive a yearly sum as rent for the land, and to share in the profits of the concern. *Held*, that A's suit for this rent will not lie in the Collector's Court, as the so-called rent is only the fixed return for A's share of the capital.

We think that the decision of the Judge in this case is substantially correct, and that the suit brought by the plaintiff for recovery of her rent was not one cognizable by the Collector's Court as one between landlord and tenant.

It appears that the plaintiff and the defendants entered into a contract of partnership to work certain mines, or supposed mines, lying underneath the soil of about 1,000 beegahs, contained in a certain durputnee belonging to the plaintiff. It was agreed between the parties that the plaintiff was to receive a sum of money as a bonus down, and also Rupees 500 yearly in two six-monthly instalments as rent for the land. She was also to receive a 4 annas share of the profits, the remaining 12 annas going to the defendants. The parties were to share the profits in the above-mentioned proportions, and also to bear the losses. And it was further stipulated that in case coal should not be discovered beneath the soil, the plaintiff was to refund to the defendants both the amount of the bonus, and also any sums which might have been received on account of rent.

This, we think, was, to all intents and purposes, a partnership arrangement; and although the terms are somewhat unusual in their nature, we think the fair and reasonable construction of them is that the rent payable was to form part of the working expenses of the concern, after which the profits were to be divided in the proportion of one-fourth to the plaintiff, and three-fourths to the defendants. The payment of rent consequently, or the money which went by the name of rent, was not a payment to be made as by a tenant to a landlord, but was in the nature of a fixed sum to be received by the plaintiff in consideration of the land which she brought into the concern, and which, in fact, represented her portion of the capital.

We think therefore that the Judge was right in holding that the Collector had no jurisdiction, and in reversing his decision.

The second ground taken in appeal was that the Judge was not entitled to reverse the judgment of the Court below in respect of one of the defendants who had not appealed, in regard to whom, it is contended, the judgment had become final. It seems that the defendants who did appeal had come in after judgment had passed against them *ex-parte*, and satisfied the Collector that they had had no notice of the proceedings. Therefore there was a rehearing, and judgment was again passed.

We think that this does not in any way affect the competency of the Court under Section 337 of the Code of Civil Procedure, and that when any one of the defendants is enabled to appeal at any time against the judgment of the Court below, the Court may, under the circumstances set forth in that Section, reverse the judgment appealed against in favor of all the defendants.

The order of the Judge must therefore be affirmed, and this appeal must be dismissed with costs.

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29th April.
CIVIL JURISDICTION.
RENT SUITS.

CASE 2196 OF 1867.

Special Appeal from Beerbhoom.

Lilla Chul Mundul, (Third Party) *Appellant, versus* Soonduree Bewa, (Plaintiff) and others, (Defendants) *Respondents.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Babco Rash Beharee Ghose for Appellant.
Baboo Motee Lall Mookerjee for Respondents.

The Collector may, in an Act X case, when it appears that a third party, has been *bonâ fide* in receipt of the ryot's rents as landlord, make him a party, whether he appears or not. No other intervenor is contemplated by Act X.

Jackson, J.—We think that in this case the intervenor was not entitled to be heard, either in special appeal or in the Courts below.

The suit was one by a tenant, under Clause 6 of Section 23 of Act X of 1859 to recover possession of a tenure from which the plaintiff alleged that he had been illegally ejected by the person entitled to receive the rents for the same.

The special appellant before us intervened in that suit, alleging that she was in possession of the land in question which had been leased only for a term to the plaintiff.

Act X of 1859 contains no provisions corresponding with Section 73 of the Code of Civil Procedure, which enables the Court to make persons who are interested in the subject-matter of the suit, and likely to be affected by the result, parties to the suit. There is one case in which the Collector's Court is empowered to bring in a party, and that is the case provided for under Section 77 of Act X of 1859. That Section, as it appears to me, contemplates not exactly intervention, but enables the Collector, "when in any suit between a landholder and a ryot or under-tenant under this Act, the right to receive the rent of the land or tenure cultivated or held by the ryot or under-tenant is disputed, and such right is claimed by or on behalf of a third person, on the ground that such third person, or a person through whom he claims, has actually and in good faith received and enjoyed such rent before and up to the time of the commencement of the suit," to make such third person a party to the suit; and this, it appears to me, might be done, whether such third person had actually appeared and intervened or no. I am of opinion that there is no other case in which the Court of the Collector is authorized to bring in as parties to the suit persons other than the plaintiff and defendant.

A case has been cited to the opposite effect (Issur Chunder Bhuttacharjee *versus* Bhyrub Chunder Shaha, III Weekly Reporter, page 166, Act X Rulings). There indeed the learned Judges say (page 167):—"It is true that Act X of 1859 does not, like Act VIII of 1859 in its Procedure Clauses, lay down any special rules under which third parties can intervene in a suit to which the plaintiff has not made them parties; but the practice, both of this Court on appeal, and of the Lower Courts, has always been to allow of such interventions upon its being made to appear *primâ facie* that the intervenors have rights and interests which will be affected by the Collector's decision in the suit, and the absence of any special Clause in the Acts on the subject may be held to sanction such a procedure, inasmuch as the law does not forbid it, and the direct result of the Collector's decision being a dealing *in rem* with the subject of suit, and it not being confined to an adjudication of abstract rights between the mere parties to the suit, it is reasonable to suppose that the Legislature intended that all persons concerned in the actual subject-matter should have the opportunity of asserting those rights previous to that decision being given."

Now I am not aware upon what foundation that assertion rests as to the practice of this Court, and no other reported case bears out the statement in question. We have an earlier case in the same volume at page 16, in which the opposite view is taken, and there is a case reported in IV Wyman's Reporter, Part II, page 13, in which this view has been adopted. I cannot find that the ruling of the two learned Judges, in the first case cited, has been followed by any other Bench of this Court. Therefore it does not appear to me that there is a sufficient conflict of decisions to make it necessary to refer the matter to a Full Bench. But being of opinion that intervention is not warranted by

Act X of 1859, I hold that the special appellant is not entitled to be heard, and the special appeal must be dismissed with costs.

Mitter, J.—I concur.

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5th May.
CIVIL JURISDICTION.
RENT SUITS.

Special Appeal from Dacca.

CASE 1468 OF 1867.

Shib Chunder Bose and others, (Plaintiffs) *Appellants, versus* Ramchand Chund, (Defendant) *Respondent.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboo Ishur Chunder Chuckerbutty for Appellants.
Babod Woomesh Chunder Banerjee for Respondent.

Where a plaintiff sues his ryot for a kabooleut, he must prove that defendant is liable to the particular rent claimed, and that he holds the definite land laid.

Jackson, J.—We think that this case falls fully within the principle of the recent decision of the Full Bench in the case of Golam Mahomed *versus* Asmut Ally Khan Chowdhry, in which it was held that a landholder suing a ryot for a kabooleut was bound to show that the ryot was liable to pay the particular rent specified in the kabooleut for which the suit was brought.

Here the case is that the plaintiff has failed to show that the ryot was occupying the lands specified in the plaint, and he now asks the Court to give him a decree for a kabooleut, specifying the lands of which the defendant admits occupation, and with such rent as may be fair and reasonable for those lands. But if the plaintiff is bound to make out the reasonableness of the rent which he demands, he is, *à fortiori*, bound to make out that the ryot is holding the particular land. He sues for a specific thing, namely, a definite rent for a definite holding; and if he fails to show that the defendant is holding the lands specified, the suit must fail.

Speaking of myself, I defer most unwillingly to the ruling of the majority in Tankooranee Dassie's case; namely, that a suit for a kabooleut at an enhanced rate may be brought without notice of enhancement. But if that be the law, I should certainly desire to guard against the undue extension of that principle by refusing to give a decree, except where the plaintiff had made out the very case set up in his plaint.

Special appeal dismissed with costs.

Mitter, J.—I entirely agree.

Special Appeal from Midnapore.

CASE 2478 OF 1867.
6th May.

Dinobundhoo Dey, (Plaintiff) *Appellant, versus* Ramdhun Roy, (Defendant) *Respondent.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Onoocool Chunder Mookerjee and *Kishensucca Mookerjee* for Appellant.
Baboo Sreenath Dass for Respondent.

Ryots who have held from before the permanent settlement *at varying rates* are in nohigher position than ordinary ryots having a right of occupancy from twelve years' occupation.

It appears to us that the judgment of the Lower Appellate Court is erroneous.

The plaintiff sued for the ejectment of the defendant from certain lands held under a pottah within the plaintiff's mehal. The defendant pleaded that he was in occupation of the land under purchase from a party who, with his ancestors and predecessors, had occupied this land from a time anterior to the permanent settlement.

The Moonsiff found that the service tenure under which the land had been previously held had been abrogated, and the land resumed by the Collector in 1837; and the then holder having accepted a pottah from the ijaradar under Government, which was to subsist during the period of the ijarah, and that period having expired, the defendant had no right to continue in the land, and he decreed accordingly.

The Principal Sudder Ameen appears to have satisfied himself, by reference to the papers of the Commissioner and Collector's Office, that a settlement at

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6th May.
CIVIL JURISDICTION.
RENT SUITS.

half-rates had been made with the defendant, and that the defendant consequently was entitled to hold the land at such rate, and he reversed the decision of the Moonsiff.

In special appeal, it is contended before us that that judgment is contrary to the law of the case; that the defendant had no rights, whether under the settlement, or by right of occupancy, or otherwise, which would entitle him to retain the land.

We have heard two vakeels for the respondent; and in disposing of the question which arises in this case, we may fairly adopt the arrangement of the subject which was proposed by Baboo Hem Chunder Banerjee. He says that the defendant's title may be made out in one of two ways; either by a document conferring such right, or by the operation of law.

Now it has not been contended that the defendant is in possession of any document which entitles him to retain the lands. He purchased the rights and interests of the party who received the pottah from the ijaradar, and that pottah gave the tenant no right to retain the land at a fixed rate, or otherwise, after the expiry of the term of the pottah.

Then it is contended that the defendant had acquired his right to retain the land by operation of law.

For this purpose we are asked to read together Sections 3, 4, and 5 of Act X of 1859.

Section 3 enacts that "ryots who, in the Provinces of Bengal, Behar, Orissa, and Benares, hold lands at fixed rates of rent, which have not been changed from the time of the permanent settlement, are entitled to receive pottahs at those rates."

Section 4 provides that "whenever, in any suit under this Act, it shall be proved that the rent at which the land is held by a ryot in the said provinces has not been changed for a period of twenty years before the commencement of suit, it shall be presumed that the land has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period."

Section 5 runs as follows:—"Ryots having rights of occupancy, but not holding at fixed rates, as described in the two preceding Sections, are entitled to receive pottahs at fair and equitable rates," &c.

Together with these Sections, we are asked to read Section 37 of Act XI of 1859, and the contention of Baboo Hem Chunder is in substance this. Section 6 of Act X defines a class of ryots, but not the only ryots who have rights of occupancy under that Act, those being merely ryots who have held and cultivated the lands for a period of twelve years, and who, by a special indulgence of the Legislature, are admitted to the same privileges as the class spoken of under Section 5; they again being ryots who have held the land since the time of the permanent settlement, although not at fixed rates.

If we are right in understanding this to be his contention, it appears to us to be entirely groundless.

It has been, as we believe, the construction invariably adopted in this Court, and we see no reason to depart from it, that in the early Sections of Act X, namely, from 3 to 6, the Legislature intended to provide for two classes of ryots, and no more; namely, ryots who have held and cultivated the land for a period of twelve years, and ryots who have held at fixed rates from the time of the permanent settlement, as described in Section 3, and who, under that Section, are declared entitled to receive pottahs at those rates. And as difficulty would sometimes arise in the way of a ryot who sought to entitle himself to that privilege, Section 4 provided the means of bringing him within the meaning of the Section, without going the whole length of proving that he had been holding since the time of the permanent settlement at fixed rates.

Then as to ryots having rights of occupancy, and entitled to receive pottahs at fair and equitable rates. Section 5 not having defined who are ryots having right of occupancy, Section 6 says:—"Every ryot who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not, so long

as he pays the rent payable on account of the same," &c.; that is to say, that a ryot who has held and cultivated land for twelve years is a ryot having a right of occupancy, and consequently entitled to a pottah at fair and equitable rates.

We see no trace of an intention on the part of the Legislature, except to provide for one class of ryots with rights of occupancy, and there is certainly no distinction as to rights between those who have held for twelve years and those who have held since the time of the permanent settlement at changing rates.

The most favorable position which the defendant could claim would therefore be that of a ryot having a right of occupancy from having held and cultivated the land for twelve years. It seems to us quite clear that the previous tenure, that of service, namely, was put an end to by the resumption, and from that time the defendant was a mere tenant holding under the terms of his pottah. Therefore, even if the question could arise as to the rights of the party holding from the time of the permanent settlement, the defendant is not entitled to any consideration on that ground, as the tenure, if any, which had existed since the time of the permanent settlement, was put an end to by the resumption in 1837.

We must then see if the defendant is a ryot who can claim the right of occupancy. It is admitted that the defendant does not inherit from the previous occupant, but has purchased from him, and has purchased within twelve years. He therefore has not held the tenure for twelve years. The previous holding is not one which he cannot, and, under the previous rulings of this Court, he is not entitled to claim the right of occupancy.

We think therefore that the judgment of the Lower Court must be reversed and this appeal must be decreed with costs.

Special Appeal from Beerbhoom.

CASE 2322 OF 1867.
8th May.

Mussamut Joydoorga Debea and others, (Plaintiffs) *Appellants, versus* Gopal Chunder Bancrjee and others, (Defendants) *Respondents.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Romesh Chunder Mitter and *Chundermadhub Ghose* for Appellants.

Mr. R. T. Allan and *Baboos Ashootosh Chatterjee, Kishen Succa Mookerjee, Moteeloll Mookerjee, Rajendur Nauth Misser*, and *Khettur Mohun Mookerjee* for Respondents.

The provisions of Section 110 of Act X of 1859, that certain tenures shall be sold according to the rules of the revenue sale law, Act XI of 1859, do not imply that such a sale can only be set aside in accordance with the terms of that law. It can be set aside by the Civil Court on ground of fraud like any other sale under Act X itself.

We think in this case that the Courts below were in error in holding that the suit was not cognizable in the Civil Court. It was supposed in both those Courts that the sale impeached by the plaintiff was one which had taken place under Act XI of 1859, and that the suit could not be instituted otherwise than in accordance with the provisions of Section 33 of that Act.

This appears to be a mistake. The sale, we find, took place under Section 110 of Act X of 1859; and by the last Clause of that Section, it is provided that if the property against which execution is applied for "be an estate or a share of an estate, it shall be sold under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land revenue."

This, it appears to us, only provides for the mode or procedure under which the sale should take place, and does not entail all the consequences, and all the effect of a sale made under Act XI of 1859 for arrears of revenue or other Government demands.

This suit, in point of form, was a suit to set aside the sale in the Collector's Court. There is authority for the opinion that a sale by order of a Revenue Court can be set aside by a decree of the Civil Court upon the ground of fraud; this matter having been directly ruled by a decision of the Full Bench

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in the case of Nilmonee Bunnick, to be found in I Wyman's Reporter, page 144, Civil Rulings.

Even, however, if the sale had been directly under Act XI of 1859, the plaintiff would not have been debarred from the remedy which she substantially seeks in the present suit. (*See* Sutherland, Privy Council Judgments, Nawab Sidhee Nazir Ali Khan *vs.* Ojoodhya Ram Khan.) There can be no doubt that what the plaintiff sought was to unmask a fraud, or a series of frauds, by which her property was attached and sold in execution of a decree for rent, which decree had been previously satisfied, and under which sale the property had passed into the hands of the co-sharers; and it might fairly be taken as the object of the suit to compel a reconveyance of the property to the defrauded owner.

In any point of view, therefore, it appears to us that the plaintiff, if she can make out such a case as that set up in the plaint, would be entitled to relief as against the defendants.

We are not precisely informed what was the nature of the arrears for which the decree went against the plaintiff. It is said to have been an arrear of allowance in the nature of *malikanah*, payable by the plaintiff as the owner of a zemindary in respect of some lakhiraj land situated within the limits thereof, and formerly resumed from a holder represented by the plaintiff in the Act X suit, and for which the allowance in question was payable under the settlement concluded in 1793. If so, it is not clear whether the suit was properly cognizable in the Collector's Court at all. If it is not, then the sale was made without jurisdiction, and cannot be supported. This must be one of the points on which the suit will have to be tried on the merits, for which purpose it must be sent back to the Lower Appellate Court.

The decision of that Court is set aside, and the case must be remitted for a new trial.

CASE 1797 OF 1867.
11*th May.*

Special Appeal from Nuddea.

Ranee Surno Moyee, (Plaintiff) *Appellant, versus* Reverend C. Blumhardt, (Defendant) *Respondent.*

Before *Phear and Hobhouse*, J. J.

Baboos Sreenath Dass and *Bhugobuttee Churn Ghose* for Appellant.
Mr. M. L. Sandal and *Baboo Onoocool Chunder Mookerjee* for Respondent.

Act X only makes tenures of ryots having a right of occupancy liable to enhancement. If a tenure is not of that class, it can only be enhanced on the ground of custom or special agreement.

The plaintiff sues in the Revenue Court to recover arrears of rent at an enhanced rate, after notice served upon the defendant, according to the provisions of Section 13, Act X of 1859. The land, in respect of which the plaintiff claims these arrears, was let to the defendant in a series of two or three takings, all of which are now comprehended, or at any rate referred to, in the pottah of 1842. It appears that Mr. Blumhardt, in the first instance, took some five beegahs of land for the purpose of building a school. He afterwards took fifteen beegahs more, and then again, we think, five beegahs, and lastly, two additional beegahs. The last plot of land was for the purpose of building a church upon, and the intermediate plots were let to Mr. Blumhardt for the express purpose of carrying out more effectually the object for which he had first taken the five beegahs, namely, the building and maintaining of a school. We have considered the terms of the pottahs, and the acknowledged purposes for which the land was let, in connection with the various decisions to which we have been referred, namely, with the decisions reported in Volume IV, Part II, Wyman's Reporter, page 21, and in Volume III, Wyman's Reporter, Part II, page 45, and also Volume III, Wyman's Reporter, Part II, page 59, and Volume V, Weekly Reporter, page 34, and Volume I, Indian Jurist, new series, page 427; and we are of opinion that this case falls within the class of cases which is held by these decisions not to be the subject of the legislation of Act X of 1859. It follows therefore that the Collector's Court had no jurisdiction to entertain the plaintiff's suit, which must consequently be dismissed. For my

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RENT SUITS

own part, however, I wish to justify the conclusion at which I have arrived by another argument. Section 17, Act X of 1859, no doubt by implication, does make the subject to which it refers liable to enhancement of rent under the circumstances of one or other of the alternatives mentioned in that Section. But the subject of Section 17 is a ryot having a right of occupancy only; and, as far as I know, there is no other part of Act X, and no other enactment outside Act X of 1859, which expressly makes any tenure liable to enhancement of rent. Therefore if any tenure, not being that of a ryot having a right of occupancy, is liable to be enhanced in rent by judicial proceedings, it must be upon the foundation of custom or of agreement, express or implied. Now, in the particular case before us, I suppose both sides would be unanimous in saying that Mr. Blumhardt is not a ryot having a right of occupancy within the meaning of Act X of 1859. If his tenure is liable to enhancement, it must be by reason of some custom affecting it, and making it so liable, or because, by the terms of the relation between himself and the plaintiff, he has expressly or impliedly agreed that it should be so. Now, certainly, to my understanding, there is no custom which is judicially recognized, within the operation of which Mr. Blumhardt's holding could come. No other custom has been established by evidence. It is not suggested that there has ever before been an instance of the enhancement of rent of land let and occupied as the site of school premises and a church, and there is nothing in the terms of the agreement between Mr. Blumhardt and the plaintiff, so far as they have been disclosed to us, which should make him liable to enhancement. Therefore, even supposing that this was a question of enhancement of such a character, in regard to the tenure and the persons affected by it, as might properly be the subject of the jurisdiction of the Revenue Courts, it seems to me that the plaintiff has failed to make out, as a matter of right, his claim to any enhancement at all. Whichever way, therefore, the case is looked at, it seems to me that the plaintiff's suit ought to be dismissed. The appeal therefore is dismissed, and the decision of the Lower Appellate Court affirmed with costs.

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SMALL CAUSE COURT AND OTHER REFERENCES.

Reference to the High Court from the Recorder of Rangoon.

Mahomed Ismailjee Mala, *Plaintiff, versus* the British India Steam Navigation Company, by their Agents, Bullock Brothers and Company, *Defendants.*

Before *Peacock*, C. J., and *Hobhouse*, J.

A provision in a Bill of Lading that any claim for short delivery should be made at Calcutta, and at no other port, merely operates so as to make the preferring of a claim to the consignor in Calcutta a condition precedent to a suit at the port of delivery or elsewhere.

Case.—In this case the plaintiff is the consignee of certain goods shipped at Calcutta under a Bill of Lading, A.

The goods consisted of a number of packages, one of which, marked A M A, was not delivered. Evidence has been given of its value, and it is shown to have been priced in the invoice at Calcutta at Rupees 494, but that its market value in Rangoon is Rupees 619-6-0. The main question in this case is one of law; that is to say, what is the effect of a Clause in the Bill of Lading which is worded as follows?—

"Any claim for short delivery of, or damage done to goods, and all other claims whatsoever, to be made at the port of Calcutta, and at no other port, and the goods are shipped, and this Bill of Lading granted subject to this express condition." This clause gave rise to the second and third issues in the case. The third issue is decided by an admission on the part of the advocate for the plaintiff that no claim has been made in Calcutta in respect of the lost case A M A.

The issue now in question is as follows:—

No. 2.—"Is the clause or note at the foot of the Bill of Lading, and relied upon by the defendants, a bar to the present suit? or does it operate so as to make the preferring of a claim at the port of Calcutta a condition precedent to the right to bring an action in this Court?"

The same question arose in another case tried in appeal before Mr. Justice Norman and Mr. Justice Seton-Karr in Calcutta, decided June 12th, 1867, reported in 4 Wyman's Reporter, page 39, in which Ebrahim Mosum was plaintiff, and the present defendants were defendants and appellants. In that case Mr. Peterson, for the defendants, appears to have revived before the Court of Appeal a contention, taken and overruled by the Recorder, that no suit would lie at all in this Court on a Bill of Lading of the present form in consequence of the clause in question; and the Court of Appeal "intimated an opinion that the clause was not meant to bar suits in Courts other than those at Calcutta, but simply to provide that claims should not be made against agents of the company at the outports, and that it was not intended to interfere with the remedies of the claimant to enforce his claim after it should have been made."

This appears to me to be a direct decision on the point taken by Mr. Peterson, and in the Court below. And their lordships, moreover, go on to overrule a further objection of Mr. Peterson's, that there was no evidence that a claim had been made, because they say, if this objection had been taken in the Court below, the respondent might have withdrawn his suit, made his claim in Calcutta, and sued again. Evidently, this decides that the making of a claim in Calcutta is a condition precedent to a suit in this Court, and this settles the case upon the second issue, and I must decide that it be dismissed with costs.

As, however, the Counsel for the parties wish it, I will refer the case to the High Court at Calcutta under Section 22 of the Recorders' Act.

Judgment of the High Court.—We are of opinion that the opinion expressed by the learned Recorder is correct, and that a suit for short delivery, under the Bill of Lading, cannot be maintained without making a claim in Calcutta.

It is unnecessary to determine whether a suit would lie at Rangoon, if a claim in such a case made at Calcutta should be rejected.

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SMALL CAUSE COURT AND OTHER REFERENCES.

A suit cannot be maintained in a Small Cause Court in the Mofussil to recover the unsatisfied balance of a decree of such Court.

Reference to the High Court by the Judge of the Court of Small Causes at Chooadangah.

Mr. M. F. Sandes and another, *Plaintiffs*, *versus* Jomir Shaikh, *Defendant*.

Before *Peacock*, C. J., and *Hobhouse*, J.

Case.—This is an action brought by the plaintiffs to recover from the defendant the sum of Rupees 59-10-4, being the amount due on an unsatisfied judgment of this Court, dated 28th February, 1863; and for the defence it is urged that the action is not maintainable, and that the claim is in reality nothing more than an application for enforcing the original judgment, and therefore, under Section 20, Act XIV of 1859, the plaintiff is out of Court, as no proceeding had been taken to enforce the said judgment within the three years next preceding the application.

When the judgment was passed, on which the present action is based, Act XLII of 1860 was the Act in force for Mofussil Small Cause Courts, and under Section 12, all decisions and orders of the Court were final; and the question, therefore, arises whether the present suit is maintainable, being founded on a judgment of a Court not of Record.

In the case of Jussorut Khan *versus* Kanye Laul Dey, quoted by Mr. Thomson in his work on Limitation, page 243, Appendix A., which was an action upon an unsatisfied judgment of the Calcutta Court of Small Causes referred to the High Court, Phear, J., said:—"The Judge considers this suit as nothing more than a revivor of the original suit. Now, I take it to be beyond dispute that the final judgment of a competent Court, whether of record or not, constitutes an original cause of action." In Williams *versus* Jones (13 M. and W., 628), which was a suit brought on a judgment of an old County Court, Baron Parke says:—"The principle on which this action is founded is, that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments in Foreign and Colonial Courts are supported and enforced, and the same rule applies to inferior Courts in this country, and applies equally, whether they be Courts of Record or not." Later cases, doubtless, have decided that judgments of the modern County Courts cannot be sued on, but that is because there are peculiarities in the nature of the judgments of these Courts which cause them not to be final. But the reason of the exception is to be found solely in the terms of the modern County Court Act. I find no reason of a like kind in the Act constituting the Calcutta Court of Small Causes to make its judgments fall short of a cause of action; and, moreover, it appears that, in Rule No. 34, the Court itself recognizes its own judgments as a good and sufficient cause of action for a new suit. I consider the cause of action which was sued upon in this case to be the judgment of the 13th March, 1860, and that it first arose on that date. The question then put to me comes to this, whether this is such a cause of action as falls within Clause 11, Section 1, Act XIV of 1859. I certainly think that the cause of action sued on is "an obligation of record" in the strict sense of the word.

Lord Campbell, C. J., in delivering judgment in the case of Berkeley *versus* Elderkin (21 L. J., 74; 6 C. C. Chron., 75), said:—"*Primâ facie*, an action could be maintained in the superior Courts on a judgment recovered in any Court of competent jurisdiction, but an examination of the County Court Act (9 and 10 Vic., c. 95) showed that parties who recovered judgments in those Courts were confined to the specific remedies pointed out in that Act. The intention of the Legislature was to give facilities for obtaining the payments of debts, and it pointed out the manner in which judgments were to be enforced; but that intention would be defeated if an action, could be brought on a judgment of the County Court in the Courts of Westminster Hall." And in the case of Chunder Narain Ghose *versus* Gouree Nath Bose (Small Cause Court References, page 1, Wyman's Reporter, Volume I), Morgan and

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SMALL CAUSE COURT AND OTHER REFERENCES.

Shumbhoonauth Pundit, J. J., said :—" We do not mean to lay down that a suit cannot be maintained on a decree, because, notwithstanding the facilities provided by the Procedure Code for enforcing execution, the rights which arise from a judgment or decree may frequently themselves require to be ascertained and enforced in a new suit, or there may be obstacles to the execution of the decree in the usual way. But in ordinary cases, and in the absence of special cause, a fresh suit on the decree is not the proper remedy, and still less is a suit maintainable on any agreement to compromise, which may have preceded the decree.

It would appear from the case of Mirza Jeleel *versus* Gora Chand Dutt (page 231), and Kissen Chunder Sircar *versus* Ram Dhone Nundy and others (page 345), of Morton's Notes of Cases, that an action of *assumpsit* is maintainable on a judgment of a Court of Dewanny Adawlut of India; and it would also appear from the case of Punchanund Ghose *versus* Kissen Mungul and others [note (*b*), page 231], that such an action is maintainable on the decree of a Zillah Court, and the cognizance of the suit, as laid in the plaint, does not appear to be barred by any Act of Parliament, or by any Regulation of the Bengal Code, or any Act of the Governor General of India in Council, and therefore, under Section 1 of Act VIII of 1859, it is cognizable by a Civil Court; nor can it be said that the present suit is brought on a cause of action which has been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and therefore, under Section 2 of the said Act, it is not cognizable by a Civil Court, as a judgment on which it is founded worked a merger of the original cause of action. It therefore appears to me that the judgment sued on constitutes an original cause of action, and that it arose on the 28th February, 1863, and is therefore cognizable by a Small Cause Court under Section 6 of Act XI of 1865, notwithstanding that no proceeding had been taken to enforce the said judgment within the time limited by Section 20 of Act XIV of 1859.

The only other question is, what is the period of limitation applicable to the present suit, one of the parties to it being a Mahomedan?

It cannot be contended that Clause 11, Section 1 of Act XIV of 1859, is applicable, as the words of that Clause are intended to point out a class of cases in which, as between the parties exclusively, English law must be administered. Clearly, the present is not one of that class of cases. I therefore think that it is a suit for which no period of limitation is expressly provided, and that, therefore, it must be governed by the provisions of Clause 16 of the Act.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that a suit cannot be maintained in a Small Cause Court in the Mofussil to recover the unsatisfied balance of a decree of such Court.

It is unnecessary to determine the second question as to limitation.

The decision by Mr. Justice Phear was on the original side, where the principles of English law prevail.

There would be no end to a case if a fresh suit may be maintained upon a decree.

MAY, 1868.

E. T. TREVOR, ESQ., AND A. MONEY, ESQ., C.B.

No. 12.

The recent change* in the financial year does not affect Return No. XLV, which will continue to show the results of the year ending 15th May, and should be submitted to the Board by the 1st June in each year.

* Circular Order No. 1 of January 1867.

2. Circular Order No. 9 of April, 1867, is hereby cancelled.

No. 13.

It has been ruled, under Government Order No. 2755, dated the 12th May, 1868, that whenever a demand is made for rent of lands occupied by Police Buildings, the District Revenue Officers, when requested by the District Superintendents of Police to do so, shall negotiate with the Landlords with a view to fix the amount to be paid on that account, and procure a satisfactory tenure of a permanent character. All District Officers are requested to act accordingly.

No. 14.

In Clause 5A, page 81 of the Board's Rules, (introduced by Circular Order No. 3 of June last,) expunge the words from the beginning of the Clause to "does not liquidate the fine or forfeiture, and," inclusive, and *substitute*, with reference to Section 61, Act XXV of 1861, "when a fine is adjudged under the Excise Laws."

No. 15.

When fines or penalties are imposed and levied from offenders against the Salt Law and Rules, the amount of such fines and penalties should be held in deposit for three months, after the date of final judgment in each case. After the expiration of this period, a special report should be made to the Board for sanction, to carry the amount to the credit of the Fund established under Section 40, Act VII of 1864.

2. Similarly, when Salt is confiscated, the Police should be directed to take charge of the same until the expiration of three months from the date of the final order, when application should be made to the Board for sanction to the sale, and the credit of the proceeds to the Fund. Any small quantity, however, of confiscated Salt, less than one maund in weight, should be sold at once, as it is liable to loss by wastage, and, as in the case of fines, the proceeds should be held in deposit, pending the final orders of the Board.

No. 16.

With the view to enable the Board to ascertain if any and what steps are being taken in each district, towards the realization of the balances due on account of Stamp Fees in Pauper Suits, all District Officers are requested to enter in the column of Remarks, in the Return No. XXIB, a precis of every order that may have been issued, or of any action that may have been taken in each case, during the quarter for which the Return is drawn up, together with the date on which such action was taken, or orders were issued. Should no order have been issued, or other action taken in any case, a short explanation of the cause of the omission should invariably be given in the same column.

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REVENUE CIRCULARS.
(Continued.)

No. 17.

The Board are about to distribute copies of the revised Public Works Code to all Commissioners and Collectors, and they desire that the Rules therein laid down, may be on all occasions carefully followed.

No. 18.

The High Court having ruled that Section CCVI, Act VIII of 1859, does not apply to Rent Suits, Clause 8, page 236 of the Board's Rules is withdrawn, and Clauses 9 and 10 altered to 8 and 9.

No. 19.

In continuation of the Board's Circular Order No. 1 for March last, District Officers are informed, with advertence to a ruling by the Comptroller General of Accounts, that the sale proceeds of confiscations made under orders of a Magistrate, or other Judicial authority, for breach of the Excise Laws, should be credited to "Law and Justice," and awards paid out of those proceeds debited to "Allowances, Refunds, and Drawbacks."

No. 20.

The following words are to be expunged from the Board's Circular No. 3 for January, 1867:—

"*l.*—Resistance of Process Cases."

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Wednesday ...	Ditto ... Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given, and a list made out ...	Miscellaneous Appeals.	
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Friday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter ... Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. } Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

Note.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman, and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
Bograh	Noakhally	Purneah	Rajshahye
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THE

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THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS; WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL; PRIVY COUNCIL DECISIONS, SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

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Appeal under Section 15 of the Letters Patent.

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CIVIL JURISDICTION.

CASE 12 OF 1867.

Ranee Surnomoyee, Plaintiff, (Appellant before the Division Bench) *Appellant, versus* Luchmeeput Doogur and others, Defendants, (Respondents before the Division Bench) *Respondents.*

Before *Peacock*, C. J., and *Loch* and *Phear*, J. J.

Baboos Sreenath Doss and *Bhugobuttee Churn Ghose* for Appellants.

Mr. R. T. Allan and *Baboos Mohinee Mohun Roy* and *Hem Chunder Banerjee* for Respondents.

(The judgment of the Division Bench will be found in Vol. II, page 147.)

The judgments of the Court upon the present appeal were delivered as follows:—

By Mahomedan law, although a wife may hold separate property, yet the mere fact that an estate stands in her name does not show that it is hers, and not her husband's. The presumption is indeed the other way, if it is shown that the husband paid the purchase-money, and regularly dealt with the estate. A contrary interpretation of the presumption is an error in law.

Peacock, C. J.—I agree entirely with Mr. Justice Campbell that the finding in this case by the Zillah Judge is such that, if upheld in special appeal as sufficiently disposing of the case, a most dangerous precedent will be created; and I may add that no judgment-creditor would ever be secure against fraudulent attempts on the part of his debtor to make away with his property, and by means of benamee transactions, prevent it from being made available to satisfy his debts.

Mr. Justice Jackson says that the judgment is not altogether satisfactory to his mind; but he still considered, and he expressed his opinion with regret, that as the Zillah Judge, whether his reasons were conclusive or not, had come to a positive finding upon an issue of fact, that this Court on special appeal was not competent to disturb the finding.

It appears to me, however, that there was a substantial error in law in the investigation of the case by the Zillah Judge, which may have, and probably has, caused an error in the decision of the case upon the merits. The decision of the Judge is so unsatisfactory, that I am glad that we are not precluded from reversing, upon special appeal, his decision upon the facts, and ordering the case to be re-tried.

There are two grounds upon which the Judge erred in point of law. He was wrong, *first*, in holding that the mere fact of the judgment-debtor's paying personally a portion of the purchase-money was immaterial to prove his ownership; and, *secondly*, in assuming, without any legal evidence of the fact, that the husband managed and looked after the property for his wife.

It was proved that the husband paid a portion of the purchase-money for the putnee talook, and that he remitted the remainder of the money to the grantor. It might have been his money, or it might have been the money of his wife, but the fact of his being in possession of the money was *primâ facie* evidence that it belonged to himself, and not to his wife. That being the *primâ facie* evidence, was there anything to rebut it in the present case?

The only evidence, if evidence it could be called, was that he purchased the putnee in the name of his wife. But the Privy Council have laid down that the purchase of property in the names of other persons is so common in this country, that it raises no presumption against the person who actually makes the purchase; that the property was purchased otherwise than for his own benefit; and that the criterion in such cases is the quarter from which the money comes. (See Gosain *versus* Gosain, 6 Moore's Indian Appeals, 53.)

In this case there was no evidence that the wife ever employed the husband to purchase the property for her, or that any portion of the purchase money belonged to her. In this respect also this case is similar to the one which I have cited.

Under these circumstances, the presumption was that the purchase was a benamee transaction, and the Judge was wrong in point of law in considering that the mere fact of his paying the purchase-money was immaterial to prove his ownership.

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In this country a Judge is Judge both of law and fact; but if, in deciding upon the facts, he deals improperly with the presumptions which the law would raise, it is an error in law which this Court can set right in special appeal. If this had been the case of a Judge directing a Jury, and had told them that in determining the question of fact, whether the purchase was made by the husband for his own benefit, or for the benefit of the wife, it was immaterial to look at the fact that the husband himself paid the money, it would have been a misdirection in point of law, for which, according to the practice in England, a new trial would have been granted.

Upon the second ground, I also think that the Judge was wrong in point of law, inasmuch as there was no legal evidence to show that the husband was managing the property for his wife.

If the husband received all the rents of the estate, and applied them for his own use, the mere fact of his giving a receipt, if he ever did so, in the name of his wife would be no more evidence to prove that he was managing the estate for her, than the fact of his taking the conveyance in her name was evidence that he was purchasing for her.

For these reasons, without going into others, it appears to me that the decision of the Judge must be reversed, and the appeal from the decision of the Principal Sudder Ameen retried upon the merits.

Mr. Justice Louis Jackson says:—"I believe that the Judge has as much investigated this case, and considered the circumstances and conclusions upon them, as he would do if we were to remand the case fifty times over."

It is unnecessary for me to go to the extent of saying that I concur entirely in that remark. I am not sure that if it were clearly pointed out to the Judge that he had not dealt properly with the presumptions, he might not come to a different conclusion upon the evidence if the case were sent back to him. But I still think that it will be more satisfactory, and productive of less expense and delay to the parties, if, instead of remanding the case to the Judge for a retrial, with at least the possibility of another special appeal to this Court, we exercise the power which we have of removing the regular appeal to this Court, and hearing the case now upon the evidence in the same way as the Judge would have to do if we sent the case back to him.

Under these circumstances, having set aside the Judge's decision, and ordered a retrial of the appeal from the Principal Sudder Ameen's judgment, I am of opinion that we ought to order the regular appeal to be removed to this Court, and try the case ourselves upon the regular appeal from the judgment of the Principal Sudder Ameen.

Loch, J.—I concur in the opinion which has been expressed by the Chief Justice, and I also think that it is advisable for us to try this case as a regular appeal from the decision of the Principal Sudder Ameen.

Phear, J.—I entirely agree with the Chief Justice, even to thinking that there are other reasons, besides those which he has specifically mentioned, which make the judgment of the Lower Appellate Court unsatisfactory and impeachable upon special appeal; but as those which have been already dwelt upon are amply sufficient to justify the decision which we have come to, I do not consider it necessary now to go into the others.

The decision of the Judge is reversed, and the appeal from the judgment of the Principal Sudder Ameen is removed to this Court to be heard by way of regular appeal.

[The Court afterwards heard the regular appeal, and affirmed the decision of the Principal Sudder Ameen.]

Regular Appeal from the 24-Pergunnahs.

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CASE 308 OF 1866.

Kasheenath Doss and others, (Defendants) *Appellants, versus* Khettur Monee Dossee, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Loch*, *Kemp*, and *Macpherson*, J. J.

Baboo Nilmonee Sein for Appellants.

Baboos Sreenath Dass and *Romesh Chunder Mitter* for Respondent.

This case was referred to the Full Bench by Norman and Seton-Karr, J. J., under the following remarks:—

Norman, J.—We are disposed to think that the widow of a Hindoo refusing to live in the house of her father-in-law cannot maintain any suit against him for a pecuniary allowance by way of maintenance. The case of Ruggomonee Dossee *versus* Shib Chunder Mullick, 2 Hyde's Reports, page 103, in which this point was decided, is, however, at variance with two decisions of this Court, (Sudder Dewanny Adawlut Reports, 1852, page 796,) and a case lately decided by Mr. Justice Kemp, and perhaps one or two other cases. We think the point should be argued before a Full Bench.

Seton Karr, J.—I concur in sending this case to a Full Bench, as there appear to be conflicting judgments. I reserve my opinion.

Held, by *Peacock*, C. J., and *Macpherson*, J., (deciding the case,) a daughter-in-law cannot maintain an action for maintenance against her deceased husband's father when she refuses to live with him, and where he has no ancestral or other property charged with her maintenance. His obligation towards her is purely moral.

Held, by *Kemp* and *Loch*, J.J., that the obligation is legal, and can be enforced so long as the daughter-in-law continues chaste, whether she live with the father-in-law or not.

JUDGMENT OF THE FULL BENCH.

Loch, J.—The plaintiff in this case, a Hindoo widow, sued to obtain maintenance from the defendant, her father-in-law. Her statement is that she was married to the youngest son of the defendant in 1260; that she received on that occasion sundry valuable ornaments from her father-in-law; that her husband died on 13th Assin, 1266, and from that time she has been living with her own parents, having been obliged to leave the house of the defendant, her father-in-law, on account of the ill-usage she received. She now sues to recover the value of her bridal ornaments and arrears of maintenance at the rate of rupees 25 a month.

The defendant admits that the marriage took place, but denies that plaintiff ever lived in his house. He says that his son was about five years old when the marriage took place, and since then plaintiff had visited his house only on two occasions—the day of his son's death, and again the day of the *shradh*. He adds "that neither the Hindoo Shasters, nor the prevalent practice of the country, would warrant the Court in entertaining the claim of the plaintiff, especially as the plaintiff has, without the consent of the defendant, and in disregard of his orders, neglected to render him the service due to his old age, and chosen to take up her abode under another roof; he (defendant) is by no means bound to make her any cash payment for her maintenance."

The case has been referred for the decision of a Full Bench under the following order (*Norman* and *Seton-Karr*, J. J.), dated 11th March, 1867:—"We are disposed to think that the widow of a Hindoo refusing to live in the house of her father-in-law cannot maintain any suit against him for a pecuniary allowance by way of maintenance. The case of Ruggomonee Dossee *versus* Shib Chunder Mullick, 2 Hyde's Reports, page 103, in which this point was decided, is, however, at variance with two decisions of this Court, (Sudder Dewanny Adawlut Reports, 1852, page 796,) and a case lately decided by Mr. Justice Kemp, and perhaps one or two other cases. We think the point should be argued before a Full Bench." Mr. Justice Seton-Karr concurred in sending the case up to a Full Bench, reserving his opinion.

It has been contended before us that, under the Hindoo law, a person is not bound to support his son's widow; that though there be a moral obligation upon him to do so, it is not a right which can be enforced by law; that even if the Court hold that the widow has a right to maintenance, the plaintiff is not entitled to recover it, because she does not reside with her husband's family, but lives with her own father.

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Looking at the current of decisions passed since 1820, I think it now too late for the defendant to contend that the widow of a son living with her deceased husband's family is not entitled to maintenance, her right to which she may enforce by suit in Court. The decision reported in 2 Hyde's Reports, page 103, has been quoted in support of the allegation that maintenance to the son's widow is only a moral obligation on the father-in-law, not enforcible by law; and we find the learned Judge in that case lays down that, "according to Hindoo law, probably the plaintiff should be maintained in the house of her father-in-law, who ought to find her in food and raiment. But when the father and the son are not joint in estate, the maintenance of the son's widow appears to be a mere moral duty on her father-in-law, to the performance of which he is not compellable by law. The absolute power of a father, as master and head of the family, over property acquired by himself, his right to distribute it at his pleasure, and to keep and reserve what he thinks fit for himself, is asserted in the most distinct manner in numerous texts: Colebrooke's Digest, Book V, Chapter 1, Section 2, pages 23 to 26, and Chapter 2, page 88.

"In page 90, the Commentator, Juggunnatha, treats the maintenance of a family out of a man's own wealth as preceptive merely, and says, at page 88, that a father slighting such precepts commits a moral offence, but incurs no civil penalty. A son's widow cannot have larger legal rights against her father-in-law than her husband would have had if alive, and such husband could not have compelled his father to give him any share of his property."

The words quoted by the learned Judge from page 88 of Colebrooke's Digest, "that a father slighting such precepts commits a moral offence, but incurs no civil penalty," relate, as will be seen by reference to the passage itself, to an improper partition of his property by a father, and not to the maintenance of his family. The passage runs thus:—"A father has dominion over property acquired by himself. Should he give no share to any one son though guilty of no offence, and give a share to one guilty of offences, who shall punish him? It cannot be affirmed that, under the authority of the texts cited from *Catayana* and *Bundbayana*, the king may punish such a father. The law propounds the moral offence committed by a father slighting such precepts, but ordains no fine, like the giver of gold to an improper object, thereby committing an offence, but incurring no civil penalty."

The passage in Colebrooke's Digest, runs thus:—"For example, equal partition may be considered as preceptive, like the maintenance of the family out of a man's own wealth. Thus the support of a married daughter residing in her father's house (for so the term is explained by *Vijnjanswara*) is approved by *Yajnyawabya* (77), although she has no title to the estate, and there is no difference, so far as proof of property is concerned, between the enjoyment of a maintenance and the receipt of a share." The duty of maintaining one's family is, however, clearly laid down in the *Dyabhaga*, page 29, Section XXIII, in these words:—"The maintenance of the family is an indispensable obligation, as Menu positively declares."

Sir Thomas Strange, in his work on Hindoo Law, Volume I, page 99, says:—"Maintenance by a man of his dependents is with the Hindoos a primary duty. They hold that he must be just before he is generous, his charity beginning at home, and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connections, including (it may be) illegitimate offspring. It extends, according to Menu and Jagneyavalka, to the outcast, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault or their misfortune, all being entitled to be maintained with food and raiment."

At page 160, Colebrooke's Digest, Volume IV, Cal. Ed., page 399,—page 322, Volume II, Stokes's Edition, we have a quotation from *Vrihospati* laying

down the duties of a widow, the last clause of which sets forth "with food consecrated to the gods and the manes let her honour paternal uncles, spiritual parents, daughter's sons, the offspring of her husband's sister, and his maternal uncles, learned men, unprotected persons, guests, and *females of the family*."

The comment on the words "females of the family" is "the widows of her husband's sons and the rest." Daughters of her husband's sisters, if destitute of protectors, are included under the term "unprotected persons." The support of them is only necessary if they be so circumstanced.

Further ont he Commentator observes :—"Consequently, she whose husband is deceased should support, in proportion to her ability, the same persons, and do the same acts in the same manner in which her husband when living supported those persons, and did those acts."

It is clear, therefore, from the above comment, that the widow, if she have means, is bound to support the widows of her husband's sons, because he was bound to do so, they being members of his family.

The duty of providing maintenance for a son's widow rests, it appears to me, on the position which a Hindoo female takes upon marriage. Though not so entirely separated from her own family as to be debarred from inheriting paternal property, when there is no maiden sister, she is in all other respects considered a member of the family into which she has married, and no longer a member of her own family. And on the death of her husband, she is bound by law to remain in her husband's family under the protection of his kindred, and must, under such circumstances, if there be ancestral property, be supported by them. We find in Section 2, page 3 of the *Dycrama Sungraha* the following passage from *Cutayana* :—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death." And in the 4th para. is a comment on the words "venerable protector;" that is, "having settled with her father-in-law in her husband's family, let her, so long as she lives, enjoy her husband's estate."

This passage clearly shows that the widow is to live with her husband's family after his death. At page 599 of Stokes's edition of Colebrooke's Digest, Volume II, page 481, is the following passage from *Cutayana* :—"If suitable food, apparel, and habitation cease to be provided for a wife, she may by force take her own property, and a just allotment for such a provision, or she may, if he die, take it from his heir." And the comment on this at page 600 is :—"But others consider this text as relating to widows. Consequently, if brothers-in-law and the rest do not give suitable food and apparel to the widow of their brother, she may claim her just allotment from her husband's brother." At page 111, Colebrooke's Digest, Stokes's edition, Volume II, page 13, is the following text from *Nareda*:—"After the death of her husband, the nearest kinsman on his side has authority over a woman who has no son. In regard to the expenditure of wealth, the government of herself, and her maintenance, he has full dominion. If the husband's family be extinct, or the kinsman be unmanly, or destitute of means to support her, or if there by no *sapindas*, a kinsman on the father's side shall have authority over the woman." And the comment on this passage is :—"Kinsman on the husband's side, of his father's or mother's race in the order of proximity. Maintenance means of subsistence. Thus without his consent she may not give away anything to any person, nor indulge herself in matters of shape, taste, smell, or the like ; and if the means of subsistence be wanting, he must provide her maintenance. But if the kinsman be unmanly (deficient in manly capacity to discriminate right from wrong) or destitute of means to support her ; if there be no such person able to provide the means of subsistence ; or if there be no *sapindas*, then anyhow determining from her own judgment on the means of preserving life and duty, let her announce her affinity in this mode :—'I am the wife of such a man's uncle ;' and if that be ineffectual, let her revert to her father's kindred, or, in failure of these, recourse may be had even to her mother's kindred." At page 152, Colebrooke's Digest, Stokes's edition, Volume II, we have the following text, 122, and comment—"She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from

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her husband's father or mother, or from her maternal uncles, else she becomes infamous." The comment upon this is:—"She also, whose husband resides abroad, should, if possible, take the protection of these persons, if she be also deprived of her sons and the rest. *She must not recur to her father's family while they are kinsmen of her lord;* for this text is referable to women whose husbands have deceased. Yet it may be also admitted under this head (women whose husbands are absent); for she whose husband resides abroad has no companion, and it is necessary that her conduct should be guarded. But the person who shall have authority over a widow is appointed by law. The person who shall have authority over the wife of a man residing abroad, should, in the first instance, be selected by her lord; in failure of that, he is appointed by the law. This distinction should be maintained."

The passages above quoted from the text writers on Hindoo Law and their Commentators, appear sufficient to establish this fact, that the maintenance of a Hindoo widow is not merely a moral obligation, but a charge on inheritance. Under the Hindoo Law, inheritance carries with it the obligation of maintaining the dependent members of the family who cannot take a share; and in this category, it appears to me, the son's widow, as well as the widow of the proprietor, falls.

Baboo Shamachurn, at page 379, *Vyavashta Durpana*, 2nd edition, enumerates the son's widow among the dependent females, though he does not quote any text directly in support of it;* but at page 122, Colebrooke's Digest, Stokes's edition, Volume II, Verse 39, para. 2, we have a passage which, with the comment, explains who are the female relations of a family entitled to maintenance. "Where female relations are made miserable, the family of him who makes them so very soon wholly perishes." The comment is "female relations," the "women of a family, as sister, *son's* or nephew's wife, and the rest," "are made miserable," are made wretched from the want of maintenance, or the like.

* But see page 522 and following, Colebrooke's Digest, Stokes's edition, Volume II, quoted previously.

That this obligation is binding on the members of her husband's family under whose protection and authority a widow should live under ordinary circumstances, some of the following precedents from Sir W. Macnaghten's Hindoo Law show, and the judgment of the late Sudder Dewanny Adawlut more immediately bears on the present case, showing the rights of a son's widow to be supported by her husband's father and his family, and to what extent and in what shape maintenance is to be given to her. I exclude all cases coming from that part of the country where the Mitakshara law prevails; for, under that law, a son, as soon as he is born, has a share in the ancestral estate with his father, and by virtue of that right his widow is entitled to maintenance when the family is joint, and she could, without doubt, enforce her right by law. (Select Reports, Sudder Dewanny Adawlut, Volume III, page 223.)

A case is reported at pages 104 and 105, Chapter "Son's Widow," Macnaghten's Hindoo Law, Volume II, case 2, in which it was held that the brother's sons having succeeded to their uncle's estate, were bound to provide proper maintenance for the widow of his son who had died before his father. In case 4 of the same Volume, page 106, where the son B died before his father, and on the death of the father the property devolved on his other sons C and D, it was held that the widow of B, though she could not succeed to a share in the property, was entitled to receive maintenance. Case 8 in the Chapter on "Maintenance" is a case in point, and there it is ruled that though the widow of a person who had predeceased his father was not entitled to claim any share of the ancestral property, or of the acquisitions made by the brothers of her husband, yet she must be maintained by the heirs and representatives of her father-in-law. The inference to be drawn from this case is clearly this: that so long as her father-in-law was *alive*, he was bound to maintain the widow of his son,—a duty which devolved on his heirs and representatives at his death. Case 11, page 119 of the same Volume, is as follows:—A son dying before his father, his widow living virtuously and obediently to her husband's family,

is entitled to obtain maintenance from her father-in-law or other successor to his property; but if her husband have received his share from his father, and been separated from him, she cannot in that case claim maintenance as against him or his heirs. In a case reported in Volume 3, Select Reports, page 33, (4th July, 1820,) it was held that the widow of a son who died before his father was entitled to food and raiment only; but in the case of Mussamut Bheeloo, reported at page 223 of the same Volume, the Court held that the amount of maintenance which a widow was entitled to receive was to be calculated with reference to the circumstances of the family, and in this case the Court awarded rupees 20 monthly. In the case of Mussamut Humita, reported at page 19, Volume IV, Select Reports, (14th February, 1825,) it was held that plaintiff, a Hindoo widow, was not entitled to a share in the estate, as her husband died before his father; but she was entitled to maintenance only, for which she was left to bring a suit. In the case of Oojulmonee, reported at page 401, Sudder Dewanny Adawlut Decisions for 1848, the Court held that the plaintiff, being the widow of a brother who died before his father, was entitled to maintenance from her legal guardians, the members of her husband's family; but that if she voluntarily withdrew from their protection, she forfeited all claims upon them, and the case was dismissed, as the separation was the sole act of the widow. The next case is reported at page 422 of the Sudder Dewanny Adawlut Decisions of 1850, (1st August,) Hur Soondry Goopta. In this case the right to receive maintenance was not disputed. The question before the Court related to the amount of maintenance, and the Court held that, under the circumstances of the family, the plaintiff was entitled to receive rupees 10 monthly, conditional on her return to her husband's family. The report does not state whether the husband predeceased his father; but, as it is a Bengal case, there can be little doubt that he had; for had it been otherwise, the widow would not have required maintenance, but would have succeeded to her husband's share of the ancestral property. The plaintiff had been receiving for some time rupees 2 a month, with food and clothes; and the Court held that if less were offered to her than she had a right to expect, she did not forfeit her right to maintenance by leaving her husband's house, and seeking shelter under the roof of her parents.

The next case is mentioned in the order of reference, and is reported at page 796 of the Sudder Dewanny Adawlut Decisions of 1852. The Court here held that, according to the provisions of the Hindoo law and precedents of the Court, a widow was entitled to maintenance from the heir of the family, the defendant in the case being the father-in-law; and it was held that as plaintiff had been expelled from the defendant, her father-in-law's house, she had not forfeited her right to maintenance, as her seeking shelter in her father's house was not a voluntary act. One other case it may be as well to notice, reported at page 1220 of the Sudder Dewanny Adawlut Decisions for 1858, Shama Soondery Debea, in which it was held that as ill-usage on the part of the deceased husband's brother was proved, the widow had not forfeited her right to maintenance by living with her husband's nephew. In the case of Sheeba Soondery Dossee, reported in 2 Taylor and Bell, pages 190 and 191, where three respectable Hindoos awarded rupees 12 a month as a sufficient allowance, with apartments in the family house and food, it was held that food and raiment was too vague and ambiguous an expression, and the master was directed to enquire whether the amount offered was just and proper with reference to her situation in life.

From the texts and cases quoted above, the following points appear to have been determined, that the maintenance of the dependent members of a family, among whom Baboo Shama Churn in the *Vyavashta Durpana* enumerates the son's widow, is a charge on inheritance; that a widow is under the guardianship of her husband's relations; that her father-in-law or his heirs and representatives are bound to maintain her in a manner suitable to the circumstances of the family so long as she continues to live under their protection; and that she does not forfeit her right to maintenance if expelled from, or compelled by

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ill-usage or want of suitable maintenance, to leave her husband's house, and to dwell with her parents; that if her husband's family be unable from want of means to support her, she may resort for support to her father's family; and that maintenance consists not merely of food and clothes, but may take the form of a grant of land or of a money allowance; the amount to be regulated according to the circumstances of the family.

The remaining point to be considered is whether a widow who voluntarily leaves her husband's house, and lives chastely, does or does not forfeit her right to maintenance.

It has been ruled in a decision of a Division Bench of this Court, reported at 2 Weekly Reporter, page 134, Civil Rulings, that, according to Hindoo law, a son's widow is entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relatives. And the ruling in this case has been followed in a subsequent case, reported in I. Wyman's Reporter, page 299, Civil Rulings; and on reference to page 333 of the *Vyavaskta Durpana*, 1st edition, we find a judgment of the late Supreme Court in the case of Judoomoni Dassee pronounced by Peel, C. J., in which it was held that a childless Hindoo widow who, after the death of her husband, *uncompelled by cruelty or ill-usage*, left the house of the family of her deceased husband to dwell at first in the house of her own father, and subsequently with her aunt living with her own relations, the residence being in all respects a proper one, and her conduct being unimpeached, did not forfeit her right to maintenance out of the property which was that of her deceased husband in his lifetime, and which had devolved on his heirs. In his judgment, the Chief Justice quoted a passage from the judgment of the Privy Council, which is in the following words:—"The Privy Council has, on the subject of the right of the Hindoo widow to return to the home of her parents, laid down a broad rule upon which it is not desirable to infringe. That Court says:—'It is not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband; his brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after her husband's death. Therefore it appears quite clear from the answers given by the Pundits, that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them in order to put herself under her mother's protection.' The decisions of that Court must of course give the law to all Courts here." In the passage quoted from the judgment of the Privy Council, it is apparent that the widow was an heiress, and as such could not be deprived of her rights to succeed to the property of her husband. The Chief Justice goes on to say:—"The answer of the Pundits, which the Privy Council adopts, is that 'if a widow from any other cause but unchaste purposes, ceased to reside in the husband's family, and ook up her abode in her parent's family, her rights would not be forfeited.' This was followed in the Sudder Dewanny in the case of a Hindow widow and heiress It is to be observed, however, that in the subsequent case of August, 1850, by the same Court, the case was considered by the *dissentient* Judge as one of doubtful authority, and the Court was of opinion that she did not forfeit her right by leaving the husband's house, and seeking shelter under the roof of her own parents, on an offer of an insufficient maintenance. In the case where the forfeiture was declared, the Judges who gave the decision observed that the deceased's husband had never owned the property, and that it was a mere case of maintenance. We do not adopt the distinction, but, nevertheless, we regard the case before the Sudder as different from the present one.

"Strange, in his book on Hindoo Law, treats the right to maintenance as a charge on the property in the hands of the heir, and it certainly has always been so considered in this Court. In the Privy Council the question was whether the Hindoo *heiress* forfeited *her estate* by selecting, without impropriety, her father's roof for her residence. But it is to be observed that the opinion of

the Pundits was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow not an heiress, as to one who inherited.

"There are certainly texts in the Hindoo Law, both ancient and modern, which speak of the right of the relatives of the husband to have the widow resident under their roof in preference to that of her own family. The modern text writers do not adopt as law all the ancient texts. The question must always be, are those positions in their nature capable of being applied by a Court of Justice, and how far are they to be modified with reference to the altered usages of society and the altered position of things? It is to be observed further, that the ancient text writers do not state in any case that maintenance is forfeited if the widow inverts the order of residence, and prefers her father's roof to that of her deceased husband. Macnaghten, in the passage of his work which is referred to in the Sudder, does not state that the consequence of non-observance of the rule as to residence is a forfeiture. We have examined the texts of the ancient law, and we think they bear out the opinions of the Pundits in the case before the Privy Council. The texts say, as to maintenance, forfeiture is incurred by unchaste life, but they do not say that it is incurred otherwise. There are many duties enjoined to women in the text of a moral or religious nature, the violation of which would never have involved any forfeiture. Forfeitures are not to be extended by construction. The duty to reside with the family of the deceased's husband is not enjoined for the sake of thrift, merely because it may in that way be least burdensome to maintain the widow, (that may be always duly regarded and provided for by the exercise of discretion in the amount and mode of maintenance), but the foundation of the duty to reside is that she may be safe from being tempted to sin, and so may avoid disgracing herself and dishonoring the family. The texts speak in condemnation of her resort to strangers for a dwelling. But the woman is presumably as safe under her own father's or family's roof as elsewhere. It is no resort to the house of *strangers*, and there is nothing dangerous, immoral, or dishonoring in the act. It is not shown to be in any way abhorrent to the usages and customs of respectable Hindoos; on the contrary, we believe it to be a common practice not disapproved of. The reasons which existed in the olden time for placing restraints on females applied just as much to female heiresses, as to females entitled to mere maintenance. Nothing can be found in the old texts which imposes the condition of forfeiture on widows and heiresses not acting strictly on the rules as to preferential residence. The stronger words have been controlled by the Privy Council with a declaration of the widow's right, founded on reasons of decorum and propriety which are applicable to all cases alike. The majority of the Court in the case in the Sudder declare the Hindoo widow to be always in a dependent state. This view is, however, dissented from by Mr Welby Jackson with much force of argument and expression. Undoubtedly, such was the ancient *status*, and to a limited extent it is true still. But the *status* of the Hindoo female has improved, and is improving."

In a suit decided by a Division Bench of the High Court, reported at page 497 of Marshall's Reports, (Norman and Kemp, J. J.,) it was held that where the maintenance of a Hindoo widow was not made by her deceased husband dependant on her living with her family, she is entitled to it, notwithstanding she leave the house of his family and go to that of her father. And in the case of Shiba Soonduree Dassee, already referred to, it appears that she was the widow of Goluck Chunder, who died during his father's lifetime, and that she voluntarily left the family house, and sued the defendants, who were the surviving sons and representatives of Ram Mohun, her father-in-law, for separate maintenance, and the Court held that she was entitled to separate maintenance.—*Vyavashta Durpana*, page 331, 1st edition.

These arguments clearly lay down the principle that a widow is entitled to maintenance even though she voluntarily leaves her husband's family and

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lives with her own parents after her husband's death. These are all Bengal cases, and from the fact that the plaintiff in each sued for maintenance only, instead of possession of her husband's share, it is evident that the husband must have pre-deceased his father. The right of the widow to receive maintenance does not appear to have been contested in these cases. These judgments, however, appear to me to go beyond the strict provisions of the Hindoo Law. They take into consideration the change which time has effected in the customs of the people, and they remove certain restrictions imposed by that law. As the law originally stood, it appears to me from some of the texts quoted above, that no separation was ever contemplated, but that the widow entitled to maintenance was expected to remain in her husband's house and among his relations. It may, however, be said that the position of the widow of a proprietor and that of his son's widow are different, and that the decisions quoted are applicable only to the former: that while the support of the widow of the proprietor is obligatory on the proprietor's family, the support of his son's widow is not obligatory on the proprietor. It is apparent from the cases quoted that the sons of a proprietor are bound to support the widow of a brother who has pre-deceased his father, and that she can enforce a right to maintenance from them. On what does this right rest? It rests, I apprehend, from their having succeeded, along with his property, to the obligations of their father. If he were not bound to maintain his son's widow, they are not bound to maintain their sister-in-law, and yet both texts and cases go to the extent of holding that they are.

There can, I think, be little doubt that one of the reasons for requiring the childless widow to live under the immediate charge of her deceased husband's relatives, and in his house, was the facility of maintaining her. It might prove exceedingly inconvenient were a widow voluntarily to leave the protection of her husband's family and insist upon a separate maintenance. The circumstances of the family might be such that, though willing to support her, if she lived with them, they might not be able to afford her a money allowance, or to transmit to her articles of food and clothing. The principal reason, however, why the Hindoo Law required the widow to live with her husband's relatives, appears to have been that she might be prevented from dishonoring the family by living unchastely. There is, however, another reason, namely, the authority given by the Hindoo Law to a brother or near relative to beget a son on the widow of the deceased, which son would be called the wife's son, and be entitled to receive the divided property of the deceased. The custom is, I believe, now obsolete, and reprehended by all classes.

In Chapter IX of Menu, Verse 167, it is written:—"He who was begotten according to law on the wife of a man deceased, or impotent, or disordered, after due authority given to her, is called the lawful son of the wife;" and, again, in Verse 146—"He who keeps the fixed and moveable estate of his deceased brother, maintains the widow and raises up a son to that brother; must give to that son, at the age of fifteen, the whole of his brother's divided property." I quote these passages out of several in Menu relating to the same subject, which appear to me to give an additional reason why the widow was expected to live in the house of her husband's relations. The permission to procreate a son in this manner did not, it must be observed, extend to the twice-born classes: for Menu says, in Chapter IX, Verses 64 and 65—"By men of twice-born classes no widow or childless wife must be authorized to conceive by any other than her lord." "Such a commission to a brother or other near kinsman is nowhere mentioned in the nuptial texts of the *Veda*."

From all that has been said above, it appears to me that, under the Hindoo law, as originally promulgated, the rule was that the widow should live with, and be supported by, the relatives of her deceased husband so long as she continued to lead a chaste life. It does not appear to have been contemplated that a widow would ever voluntarily leave her legal protectors while they were able to support her, and consequently no provision for her maintenance has been

declared. The absence of such a provision does not, I think, raise the inference that if the widow left voluntarily she was still entitled to maintenance so long as she remained chaste. Judging according to the strict rules of Hindoo law, I think the widow would not be entitled to maintenance. But there can be no doubt that, in the present day, many of these rules are not strictly observed, and that the customs of the present time are not in strict conformity with the rules as laid down by the old text writers; and it may be said that, owing to the effects of education or other causes, this, with many other rules, has become almost obsolete. This may be true as regards the Hindoo population in and near the Presidency towns, but is hardly true of the more distant parts of the country where old customs still prevail; and hence the difficulty of laying down any general rule which shall be applicable to all parts of the country alike. The course of all the more recent decisions has, no doubt, been to consider the widow independent as to residence, and entitled to maintenance so long as she remains chaste, and we should have no difficulty in applying that rule to the present case, but we cannot say that it is applicable to all cases.

If we look only to the Hindoo law, I think that the rule is that the widow of a son should remain with the family of her husband, and be supported by them; that if she leave their protection, she is not entitled to demand maintenance from them, except she be able to show that her departure from the family was occasioned by ill-treatment, neglect, or insufficiency of necessary support. No doubt, for any of these causes she might leave the house, and be entitled to maintenance from her husband's family so long as she continued to lead a chaste life. The decisions quoted above* certainly show that, in Calcutta and its neighbourhood, it is not unusual for Hindoo widows to leave the residence of their husbands and to return to that of their own parents or relatives. But if we have to decide the question according to the authorities on Hindoo law, I have no hesitation in saying that the widow is bound to remain with her husband's family, and that his father, if living, and the family, if he be deceased, are bound, so long as she continues chaste, to maintain her; that if the family be too poor to provide maintenance, she may return to her father's family; but if the family be able to support her, she can only claim maintenance if she separate on the ground of ill-usage or insufficiency of maintenance, or the like. Where there is ancestral property, there can, I think, be no doubt that the widow is entitled to support; and, looking at the obligation to support his family, which the law imposes on every Hindoo, it appears to me that where the means are self-acquired, the father is as much bound to maintain his widowed daughter-in-law as if he were in possession of ancestral property.

* Shibo Soondaree Dossee and Judoomonee Dossee.

The case should, I think, be returned to the Lower Court to determine whether any sufficient ground for leaving the protection of her father-in-law has been made out by the plaintiff; and if this be proved, that the Court award her maintenance, calculating it according to the circumstances of the husband's family.

Peacock, C J.—The question referred for the decision of a Full Bench is whether the widow of a Hindoo, refusing to live in the house of her father-in-law, can maintain a suit against him for a pecuniary allowance by way of maintenance.

In the present case the plaintiff left the house of her father-in-law and went to reside with her own father, and she alleged that she was driven to do so by ill-usage on the part of her father-in-law.

There is no allegation in the plaint that the defendant has any ancestral property, or any property upon which the plaintiff's maintenance is a charge.

Two questions seem to arise out of the point submitted for the opinion of the Full Bench, *viz*, *first*, whether the widow of a Hindoo refusing to live in the house of her father-in-law, can sue him for a pecuniary allowance by way of maintenance, if she leave his house without reasonable cause; and, *secondly*, is she entitled to maintenance if she leave on account of ill-usage or other reasonable cause?

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In the case cited from the 2nd volume of the Weekly Reporter, page 134, it was held that a daughter-in-law has a right to maintenance from her father-in-law so long as she is chaste, whether she continues to live with him or not, and Mr. Justice Kemp is still of that opinion.

It appears to me, however, that, according to the law as administered in Lower Bengal, a daughter-in-law has not in either case a legal ground of action to recover maintenance against her father-in-law.

The rights of a wife or a widow, and those of a son's widow, to maintenance appear to me to be governed by very different principles. A son's widow has not the same legal rights against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her husband who take his estate by inheritance. The father is not heir to his son in preference to the son's widow.

A son's widow has no right in her father-in-law's estate, and upon partition of such estate, she is not, like a daughter, entitled to a share, even though the estate was ancestral.

The rule laid down in Ruggomonee Dossee *versus* Shibchunder Mullick, Hyde's Reports for 1864, page 103, *viz.*, that the maintenance of a son's widow is a mere moral duty on the part of her father-in-law, and that the case is distinguishable from those in which an heir takes property subject to the obligation of maintaining persons who are excluded from inheritance, or those whom the deceased proprietor was morally bound to maintain, appears to me to be correct.

The obligation of an heir to provide out of the estate which descends to him maintenance for certain persons whom the ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance. A son who takes his father's estate by inheritance is bound to provide maintenance for his father's widow. The obligation is a charge upon the estate, which continues as long as the widow remains chaste, whether she continue to live in the family of the heirs or not.

I apprehend that a son's widow has no greater right to sue her father-in-law for maintenance after her husband's death, than she would have in her husband's lifetime, if he were unable to maintain her. If there is a legal obligation, does it extend to every widow whom every son (however numerous the family) may leave without a sufficient provision for her maintenance? Does it extend to cases in which the marriages are contracted after the sons are of mature age, and whilst they are living separate? If not, to what extent is the rule limited by the Hindoo law?

I have looked carefully into the authorities, and cannot find anything to satisfy me that a son's widow is entitled to sue to compel her father-in-law to maintain her where he has no ancestral property, and nothing beyond his separate estate, which has been acquired by himself.

Some of the books speak of the husband's relations generally, but I apprehend that a brother, or other distant relation, cannot be legally, although he may be morally, bound to support all the widows of all his brothers or other near relations, who have no means of subsistence, unless he takes some property which renders him liable to the charge.

The dependent members referred to in the *Vyavashta Durpana*, and who are spoken of as being entitled to maintenance, are said to have claims to be maintained out of the late proprietor's estate. (See page 317, para. 154; page 321, para. 163.)

If a son takes his father's estate, or a widow her husband's estate, by inheritance, it is only reasonable that they should be held legally liable to do what the father or husband was morally liable to do, and which, it is to be presumed, he would have done out of the estate if he had lived, but I am not sure that even in such cases the legal liability is carried to that extent.

In the case cited from Sudder Decisions, 1852, page 796, it was said that the father-in-law was bound to maintain the widows of his eldest son, as, "accord-

ing to Hindoo law and the precedents of the Court, the widow is entitled to maintenance from the heir of the family." The father was not the heir of his son during the widow's life, and the case seems to have confounded the case of a widow seeking for maintenance from the son as heir of her husband, or to have referred to the father as the heir of the family in respect of ancestral estate.

The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate, not for his own benefit, but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow. (See *Vyavashta Durpana*, 1st edition, page 317.)

If the father-in-law is legally responsible for the maintenance of his daughter-in-law, where is the legal obligation to stop, if he dies without leaving property? This is not the case of a widow or heiress such as are spoken of by the Chief Justice in the case referred to by Mr. Justice Loch. There is no ancestral property upon which the daughter-in-law has a charge for maintenance. This is not a question of a charge upon inheritance. The father-in-law is not stated to have inherited anything. He states that he is a pensioner of Government with a small pension, not more than sufficient to maintain himself and his own family. It is not necessary to determine that he is so; but, for the sake of argument, it may be asked, is such a pensioner bound to maintain all the widows of all his deceased sons? Is he to save nothing for his own widow, lest he should die before her, when his pension would cease?

According to the decision in II. Weekly Reporter, 134, the daughter-in-law would be entitled to have a part of the pension to be spent by her in her own father's family, though the father might be willing to provide for her in his own. Is the father-in-law to send food or money, and to what distance is he to send it, if the daughter-in-law chooses to live with her own father? If a son and a father, joint in food and estate, should separate, and each take his own share of the estate, and the son, after partition, should enter into business and lose all that he has taken, would the father, after the death of the son, be bound to support his widow? We must not convert all the moral obligations enjoined by the Hindoo law into legal liabilities. We should do much mischief by want of care in this respect.

I am of opinion that, in the present case, the plaintiff has no legal right to be maintained by her father-in-law so long as she elects to live with her own father, and that the decree of the Lower Court must be reversed with costs, and the plaintiff's suit dismissed. As the Judges are equally divided in opinion, the case is decided according to the opinion of the Chief Justice.

Kemp, J.—I concur generally in the view of the Hindoo law on the subject of maintenance taken by Mr. Justice Loch, but I would not remand this suit, but dismiss the appeal, as I am of opinion that a Hindoo widow is entitled to maintenance as long as she leads a chaste life, whether she live with her father or her husband's relations. The maintenance of the female members of the family, and amongst them ranks the daughter-in-law, is obligatory on a Hindoo. The law on the subject has been carefully and very fully stated by Mr. Justice Loch, and I have nothing to add to his remarks.

Macpherson, J.—I concur with the learned Chief Justice in the answer which he proposes to give to the question referred in this case.

I think that when a son dies in his father's lifetime, leaving no estate whatever, his widow has not such a right to maintenance as can be enforced at law.

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CASE 650 OF 1867.

Miscellaneous Appeal from Midnapore.

Nobo Loll Khan and another, (Decree-holders) *Appellants, versus* Moharanee of Burdwan, (Judgment-debtor) *Respondent.*

Before *L. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboo Kally Prosono Dutt for Appellant.
Baboo Chunder Madhub Ghose for Respondent.

Where plaintiff's suit is decreed in part originally, and dismissed in part on appeal, and he does not take out execution within three years from the date of the original decree, he will still be entitled to set-off his costs on the part of his claim decreed against defendant's execution for costs of the part dismissed.

Jackson, J.—It appears to me in this case that the Judge is substantially right. The suit was one for the resumption of various parcels of land. At first the Court which tried the case gave the Ranee (the plaintiff) a decree for a portion of her claim, which, in fact, was not seriously resisted by the defendant, and the decree bore costs in proportion. Subsequently the Ranee, not satisfied with that partial decree, applied to the Court for a review of its judgment, and obtained from the same Court, some time in May, 1863, a further decree for the rest of her claim. That subsequent and supplementary decree was carried in appeal to the High Court, and the High Court, in 1865, reversed the further decree, and gave judgment for the defendants on that part of the case, with all costs of the proceedings in proportion.

The Ranee allowed more than three years to elapse from 1863 without making any application to execute the partial decree which she had at first got, and which had not been disturbed; but in 1867 the defendant applied to execute his decree for costs. Thereupon the Ranee petitioned that, before executing the defendant's decree, so much of the costs as had been decreed to her under the decision of 1863 might be deducted and set-off.

The defendant to this replied that her (the Ranee's) decree was incapable of being set-off, by reason of its being barred by the lapse of three years.

The Judge seems to hold that the Ranee's decree was not barred, inasmuch as her appearance in the High Court to resist the appeal of the defendant was a proceeding taken by her to keep her decree in force, and on that ground he holds that her decree was not barred, and that she might execute it.

Against this decision the defendant now appeals, urging, as he urged in the Court below, that execution of the Ranee's decree was barred, and that in such case the provisions of Section 209 will not apply. A case has been referred to which is cited in Broughton's Civil Procedure Code (2nd Edition) in the note on Section 209. It is reported in Wyman's Reports, Vol. I, page 109.

It would appear from that case that if the decrees had been separate and independent decrees, there would be authority against allowing the party who held the decree for the smaller sum to set it off against the larger one. This case, it appears to me, is distinguishable from such a case as that. I am clearly of opinion that, although in form the decree obtained by the defendant is distinct from the decree passed in the other portion of the case, yet, substantially, these two judgments and decrees being in the same suit, and relating to parts of the same subject-matter, are, in fact, only parts of one general judgment and decree. And we must deal with the matter before us as if the two decrees had been reduced to one, wherein judgment was given in part for the plaintiff, and in part for the defendant, with proportionate costs to the several parties. That being so, it is the duty of the Court, before issuing a warrant of execution, to ascertain how much on the whole case is actually due to the party executing, and to issue a warrant for that sum, and no more.

Another point is suggested by my learned brother Dwarka Nauth Mitter, of which the Ranee appears entitled to claim the benefit. The defendant proposes to bar the execution of her decree by the words of Section 20 of Act XIV of 1859. That Section enacts:—"No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court," &c.

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Now the Ranee is not here asking for any "process of execution." She only asks that the Court, having the proceedings before it, will refrain from issuing a warrant of execution, except for such sum as, on a review of the whole of the proceedings, appears to be due from her. The words of the Section do not deprive her of the benefit of Section 209, or rather of the principle to be applied to this case, by analogy, from Section 209. I am of opinion, therefore, that, for the reasons stated, the Judge was right in refusing to execute the decree, without taking into account the amount due under her decree to the Ranee, plaintiff, and therefore the appeal must be dismissed with costs and interest.

Mitter, J.—I entirely concur with my learned colleague.

It appears that at the time when the decree of May, 1865 was passed in favor of the appellant before us, the Ranee's decree of May, 1863 was not barred by the Law of Limitation. The moment, however, that the former decree, which was for a larger sum of money, was passed by the Court, the Ranee's decree became incapable of execution under the provisions of Section 209 of the Procedure Code. From that moment the Ranee became incompetent to execute her decree, and she could not have therefore taken out any process of execution within the meaning of Section 20, Act XIV of 1859, nor is she asking for it at the present moment. All that she says is that the appellant should not be permitted to take out execution for anything more than the difference between the respective amounts of the two decrees; and in this respect her contention is borne out by the express wording of Section 209. The question of limitation therefore cannot arise in the present case. The Ranee's decree has been merged, as it were, in the decree obtained against her by operation of law; and the same law also declares that the latter decree can be executed only to the extent of the difference stated above. I would therefore dismiss this appeal with costs.

Special Appeal from Bhaugulpore.

CASE 1198 OF 1867

29*th April.*

Madhoo Dyal Sing, (Plaintiff) *Appellant, versus* Golbur Sing and others, (Defendants) *Respondents.*

Before Peacock, C. J. and *L. S. Jackson, Phear, Macpherson*, and *Dwarka Nauth Mitter*, J. J.

Baboo Mohinee Mohun Roy for Appellant.
Mr. C. Gregory for Respondents.

This case was referred to the Full Bench on the 3rd December, 1867, *under the following orders recorded by the Honorable Justices F. B. Kemp and F. A. Glover:—*

The circumstances of this case have already been detailed in our judgment in special appeal No. 1057.

This special appeal is preferred by the plaintiff against that part of the Principal Sudder Ameen's decision which orders him to repay the money advanced to his father Sheo Kishen, (Rupees 2,900,) before he can get possession of the family property.

The Principal Sudder Ameen has decided that the plaintiff must refund, on the authority of a decision of this Court, dated September 30th, 1863, Muddun Gopaul Thakoor *versus* Ram Buksh Panda and others, (II Wyman's Reporter, 81,) in which it is laid down that, in the absence of evidence to the contrary, it must be presumed that the price received by a father selling a portion of an ancestral estate, became part of the assets of the joint family; and that if a son seeks the aid of a Court to set aside the purchase, he must do equity, and offer to repay the purchase money, unless he can show that no part of such purchase money, or the produce of it, ever came into his hands.

We have been unable to find any other decision of this Court in which a similar doctrine has been laid down, and we are unable to assent to it.

Under Mitakshara law, if a son can show that there was no necessity for his father's alienation, and that he never acquiesced in it, he would be entitled to recover without refunding the purchase money, or any part of it. If, however, the purchase money went to credit of the joint estate, or was applied to removing an incumbrance binding on the son, he would have to refund, or the purchaser would be in the position of the incumbrancer.

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A long current of decisions* has fixed it as settled law that, by the Mitakshara, a father cannot alienate ancestral property without the consent of a son, unless for certain necessary purposes. In all other cases the son has an absolute veto in the sale, and must succeed in a suit to set it aside.

* Beginning with the Sudder Dewanny Adawlut Ruling in the case of Ameerut Misser, Sudder Dewanny Adawlut Reports, 1861, page 193, and ending with the Full Bench Ruling of the High Court in the case of Rajah Ram Tewary and others, IV. Wyman's Reporter, 28.

In the present case it has been found that there was no necessity, and no acquiescence, and we do not see, therefore, why the purchaser should be entitled in equity to a refund from the son of his purchase money. The son never knew of the sale, and never agreed to it. The sale may have been of a most imprudent description, and one which no man of sense would have made.

In the present case neither the son nor the father appears to have derived any benefit, for the land was sold in order to redeem a mortgage which had still three years to run, and on which no advantage is even alleged.

But even were it not so, it appears to us that as the Mitakshara law gives a son an equal right with the father in the matter of alienation, it must give him that right absolutely, and that a son seeking to set aside imprudent or unnecessary sales made by a father, is not bound to refund to the purchasers. If it were so, he would not succeed on his right as a son, but on his power as a man of substance. A poor man would be virtually deprived of the right which the Mitakshara law undoubtedly gives him.

Cases of this sort appear to us to be those in which the maxim of *caveat emptor* should be strictly applied. Every purchaser in the Mithila districts knows perfectly well the nature of a father's rights in ancestral property; and if he chooses to purchase without first securing the consent of the heir, or without assuring himself of the existence of a necessity, he has only himself to blame if the son recovers possession of what has been improperly taken from him. He appears to us to have no claim to equitable consideration.

As our opinion differs from that of the learned Judges who decided the case above referred to, we must, in accordance with the rules of practice laid down for guidance, send up this case for the orders of a Full Bench.

The point on which we ask the Full Bench's decision is whether, under the Mitakshara law, a son, who recovers his ancestral estate from a purchaser from the father on proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, is bound in equity to refund the purchase money before recovering possession of the alienated property.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J. *(the other Judges concurring)*:—The question upon which the opinion of the Full Bench is asked is, under the Mitakshara law, is a son, who recovers his ancestral estate from a purchaser from the father upon proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, bound in equity to refund the purchase money before receiving possession of the alienated property.

There can be no doubt that, although the word "recovers" is used in this question, the meaning is whether, under the circumstances stated, a son is entitled to recover, except upon condition of refunding the purchase money. Assuming that to be the question, I think the answer should be that, in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding the purchase money, or any part of it. We express no opinion as to whether he would be entitled to recover the whole or only his share of the estate.

Having answered the question propounded, I think we ought to add that, if it is proved to the satisfaction of the Court that the purchase money was carried to the assets of the joint estate, and that the son had the benefit of

his share of it, he could not recover his share of the estate without refunding his share of the purchase-money; so if it should be proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate which was binding upon the son, and the purchase-money was applied in freeing the estate from the incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not have compelled the immediate discharge of it, and that the decree for the recovery by the son of the ancestral property, or of his share of it, as the case might be, would be good, but should be subject to such right of the purchaser to stand in the place of the incumbrancer.

It appears to me, however, that the *onus* lies upon the defendant to show that the purchase-money was so applied. I do not concur with the decision which has been referred to from II Wyman's Reporter, page 81, in which it is said that "in the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family." If the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* lies on the person who contends that the son is bound to refund the purchase-money, before he can recover the estate, to show that the son had the benefit of his share of that purchase-money. If it should appear that he consented to take the benefit of the purchase-money with a knowledge of the facts, it would be evidence of his acquiescence in the sale.

I think the case must go back with this answer to the Division Bench which referred the question to us, in order that the case may be finally determined upon the merits by that Bench.

Special Appeal from Beerbhoom.

CASE 654 OF 1867

29th April.

Gogaram, (Defendant) *Appellant, versus* Kartick Chunder Singh, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *L. S Jackson, Phear, Macpherson*, and *Hobhouse*, J. J.

Baboos Kallee Kishen Seiy and *Kadar Nauth Chatterjee* for Appellant.
Mr. R. T. Allan and *Baboo Ashootush Dhur* for Respondent.

This case was referred to the Full Bench on the 26th September, 1867, under the following orders recorded by Loch and Dwarka Nauth Mitter, J. J.

An action will lie in the Civil Court on behalf of a decree-holder against the holder of another decree for obtaining a refund of money which has been paid to the latter under an order passed in the Execution Department contrary to the provisions of Section 270 of the C. P. Code

This was a suit instituted by the plaintiff, special respondent, to recover a certain sum of money that has been paid away to the defendant, special appellant, under an order of the Civil Court passed in the Execution Department. It appears that the plaintiff and the defendant are two rival decree-holders against one and the same judgment-debtor. Certain properties belonging to the judgment-debtor having been sold in execution, an application was made by the plaintiff to the Judge to have his decree satisfied, *first* from out of the proceeds realized by the sale. The Judge refused this application on the opposition of the defendant; and a miscellaneous appeal being preferred to this Court, the order of the Judge was reversed, though it appears to us that the appeal was entertained without jurisdiction. In the meantime, however, the money having been paid away to the defendant under an order of the Judge, the plaintiff has been obliged to bring the present action to obtain a refund of the same, upon the ground that the process of attachment taken out by him being prior in point of date to that taken out by the defendant, he, and not the defendant, had a preferential title to the sale proceeds. It is now contended before us in special appeal that such a suit would not lie; and in support of this position, two cases have been cited to us at the argument, the first of which is reported in page 181 of the special number of the Weekly Reporter, and the second in page 99, volume 8 of Wyman's Reports. We think, however, that this contention is not sound, and that the precedents relied upon are contrary to law. In support of this view, we have very little to add

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to the able and elaborate judgment recorded by Mr. Justice Levinge, whose opinion was overruled by a majority in the first case. There is no statutory bar to the hearing of such a suit; and, in the absence of such a bar, we think that the Civil Courts are bound to take cognizance of it as provided for in Section 1 of the Code of Civil Procedure. Nor do we think that there is any reason in justice or equity why the plaintiff should be deprived of the ordinary privilege of suing for that to which he was legally entitled, and which has been made over to a wrong party by an erroneous order of the Court passed in a summary manner. The absence of any provision for an appeal in the Miscellaneous Department seems to us to afford an additional reason for supposing that the Legislature did not intend to give any finality to the proceedings held in that department. As, however, the two cases above referred to are directly in favor of the contention raised before us by the special appellant, we are obliged to wait for a more authoritative ruling, before disposing of the case upon our own responsiblility. We accordingly refer this case to a Full Bench for the determination of the following question :—

Whether an action will lie in the Civil Courts on behalf of one decree-holder against another for obtaining a refund of money that has been paid away to the latter under an order passed in the Execution Department in contravention of the provisions laid down in Section 270 of the Procedure Code.

DECISION OF THE FULL BENCH.

Peacock, C. J., (*the other Judges concurring*) :—The question which has been asked is whether an action will lie in the Civil Courts on behalf of one decree-holder against the holder of another decree for obtaining a refund of money which has been paid to the latter under an order passed in the Execution Department contrary to the provisions of Section 270 of the Procedure Code.

We are of opinion that the question ought to be answered in the affirmative; but we must guard ourselves from being understood to determine that the plaintiff in such a suit would, under all circumstances, be entitled to recover. There may be circumstances by which he may be equitably precluded from recovering; and it will be for the Court which decides the suit to determine whether, having regard to all the equities between the parties, the plaintiff is entitled to recover or not.

I concur in the view taken of this case by the decision of the Full Bench of the Agra Sudder Court, to which we have been refefred by Mr. Allan, and which is reported at page 443 of the Reports of the Agra Court for September, 1864.

Section 270, Act VIII of 1859, does not expressly give a right of appeal; and by Section 364, it was enacted that no appeal shall lie from any order passed after decree, and relating to the execution thereof, except as is hereinbefore expressly provided. It is clear, therefore, that no appeal lay against such an order, although in one case the order was reversed by a Division Bench upon appeal. The Judges in that case, which is reported in II Weekly Reporter, Miscellaneous Rulings, page 48, held that the decree-holder, at whose instance the property was sold, was entitled to be paid first, and they set aside the order of the Judge, declaring that payment should be made to the decree-holder who first attached the property. This is contrary to the ruling reported in the same volume, page 21, where it was held that there was no appeal from an order directing the distribution of the sale proceeds. But the fact of the order having been set aside, does not, in my opinion, deprive the plaintiff of his right of action.

By Section 1, Act XXIII of 1861, Section 283 of the Code of Civil Procedure was repealed; and by Section 11 of Act XXIII of 1861, Section 283 was reenacted, with this addition "that any questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal." In cases between parties to the suit, therefore, the order was made subject to appeal, and a right to bring a separate suit to reverse the order was taken away.

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In this case the question did not arise between the parties to the suit, and consequently the order was not open to appeal. At the same time there is no express provision by which the right to bring a separate suit has been taken away. When the right of appeal was taken away by Section 364, it appears to me that it was not the intention of the Legislature to take away the right of contesting the summary order by a regular suit, and that seems to be the view of the case taken by Section 11 of Act XXIII of 1861, which is to be read as part of Act VIII of 1859; for when, by that Section, an appeal was given in regard to the matters to which the Section referred, the right to contest the order by a separate suit was expressly taken away.

I am not sure that Section 270 of the Procedure Code applies to this case at all. The property was first attached under a decree of the Moonsiff's Court at the suit of the plaintiff, and was subsequently attached and sold at the suit of the defendant under a decree by the Judge's Court, and the proceeds were made over to the defendant. It seems to me that whilst the property was under attachment by the Moonsiff's Court, it was not liable to be sold under the decree of the Judge's Court, although it might have been attached subject to the prior attachment of the plaintiff.

I wish to make one remark with regard to the judgment of Mr. Justice Trevor. He says "that as the action is for money had and received by the defendant to the plaintiff's use, it is necessary that there should be privity between the plaintiff and the defendant." The suit was simply to recover from the defendant a sum of money which the plaintiff contended had been erroneously paid over to the defendant, instead of being paid over to the plaintiff. The plaintiff said nothing of the money having been received by the defendant to the plaintiff's use; and there is nothing more likely to mislead or to confuse than by converting a suit brought in the Courts of Justice in the Mofussil in this country to the forms adopted according to the English procedure.

If the order of the Judge had not been set aside, the suit would have been one to recover the money from the defendant which had been erroneously paid over to him under a summary order under the execution, or, to use the language which is commonly applied to suits of this nature, to recover the money from the defendant by setting aside the order of the Judge.

In such a suit, there is no privity between the complainant and the defendant.

This case will go back for final decision to the Division Bench which referred it for our opinion.

Special Appeal from Backergunge.

CASE 1716 OF 1867.

6th May.

Ramoona and another, (Defendants) *Appellants, versus* Manicomoyee Chowdhrain and others, (Plaintiffs) *Respondents.*

Before *Phear* and *Hobhouse*, J. J.

Baboos Onoocool Chunder Mookerjee and *Unnodapurshad Banerjee* for Appellants.
Baboos Sreenath Dass and *Ashootosh Chatterjee* for Respondents.

Causes of action not by and against the same parties cannot be joined in one suit. The plaintiffs in a suit must always proceed on the same grounds, though the defendants may have varying defences.

Manickomoyee and Juggurnath held each of them a decree against one Poorno Chunder. Upon seeking execution of their decrees by attachment and sale of what they supposed to be the property of the judgment-debtor, these judgment-creditors met with opposition. Part of the property was claimed by one Ramoona, the widow of one Goluck Chunder, deceased, and another part of the property was claimed by one Kisto Chunder, alleging that he had bought it from Goluck Chunder. On this state of facts, the two judgment-creditors, Manickomoyee and Juggurnath, together bring this suit against Ramoona and Kisto Chunder, claiming to have the whole of the property, to which these two defendants separately asserted title, declared to be the property of their judgment-debtor, and available to be taken in execution, and sold under their, the plaintiffs', several decrees. The defendants protested that the causes of action

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of the two plaintiffs were separate and distinct, but their objection was overruled by the first Court, and a decision given in favor of the plaintiffs to the extent of half-share of the property, which is the subject of suit.

Against this decree there were two appeals,—one brought by the plaintiffs jointly, and the other by the defendants jointly. In the latter the defendants again objected that the claims of the plaintiffs were separate, and could not form one cause of action. Again this objection was overruled, and upon the two appeals, namely, the appeals of the plaintiffs and of the defendants, the Lower Appellate Court gave a decision in favor of the plaintiffs for the whole of the property.

The defendants now come on special appeal before us, and urge for a third time that the causes of action upon which Manicomoyee and Juggernath sued were separate, and could not properly be united, so as to form a common claim. I think that this objection ought to prevail. The truth is that, under the plaint preferred by the plaintiffs Manicomoyee and Juggernath, four distinct actions were covered,—two by Manicomoyee against Ramoona for one portion of the property, and against Kisto Chunder for the other portion of the property, and two by Juggernath against Ramoona and Kistochunder in like manner. In my opinion, the law of Civil Procedure in this country, not only does not countenance a joining or rather lumping together of four distinct suits in this manner, but I think it forbids it. I have no doubt, judging by implication, that the earlier clauses of Act VIII of 1859, the Act which constitutes our procedure, were framed in contemplation merely of a single cause of action to be sued on by one plaintiff, it may be consisting of more persons than one against one defendant, who may be, in the like manner, complex. Then comes Section 8, which provides that several causes of action by and against the *same* parties, and cognizable in the same Court, may be joined in the same suit; but at the same time the Procedure Code provides, by Section 9, that if two or more causes be joined in the same suit, although that course has been taken by the plaintiff in accordance with Section 8, still even then the Courts may separate them if they think that they cannot conveniently be tried together. To my mind, these two clauses afford the only indication given in Act VIII that several causes of action may be combined together in one suit. There is no suggestion, I think, I may venture to say, from the beginning to the end of Act VIII, that causes of action between different plaintiffs and different defendants respectively should be united and tried at one trial. On the contrary, I think that the express provisions of Sections 8 and 9, and the care exhibited in them on the part of the Legislature to limit the combination of causes of action even in those cases, with which those Sections deal, do, by implication, amount to saying that the larger and more extensive union of causes of action, with regard to which the Act is silent, are not only not contemplated, but forbidden by it. I need hardly point out that, whatever may be the case on the particular facts brought before us in this appeal, the causes of action of Manickomoyee and Juggernath are so different, so distinct in their nature, as that they might be dependent upon entirely different evidence for their respective substantiation. In like manner, the defence to the two might easily be imagined to be equally different. If this were so, it would be a monstrous injustice that the defendants should be obliged, in spite of their protest from the beginning, to have their distinct defences to the one claim, and the other confused together and tried as one between them and these two several plaintiffs in one action, just as if the two plaintiffs had a common ground of suit against them. Even as the case stands before us, Manickomoyee would fail in her suit if she could not prove that she held the decree which she alleges she has; for it is the essence of her right to bring this suit that the property forming the subject of the suit should be made available for the purposes of satisfying her decree. If she cannot show that she has a decree to execute, she is certainly out of Court. And it is obvious that the particular decree upon which she relies for her title to sue must be specifically proved, as her right to the decree which she seeks may depend materially upon the date of, and other facts connected with, that which

she wants to execute. So also with Juggernath. And if Juggernath proved his decree, while Manickomoyee was unable to establish hers, the question would arise in the combined suit whether the suit should be dismissed, or whether it should be partially decreed. I confess that, saving all questions of abatement, and matters in amendment of the record, I have never, in my memory, heard of a suit decreed in favor of one co-plaintiff, and dismissed as against the other co-plaintiff. And that negative fact of usage is, I think, influential to show how very impracticable, quite apart from any matter of law, it has been found that combined suits of this character should be united together, and treated as if they were one. I think it would be hopeless to expect that a trial at law between parties should lead to a satisfactory conclusion, unless at least the pursuing party be kept single, although no doubt it may well be, and often is the case, that those who defend stand each upon his own separate ground. I further think that our Procedure Code assumes, if it does not expressly say, that the plaintiff always is single, and that it no where gives any warrant for allowing two or more plaintiffs to make together their separate claims in one action. In my judgment, therefore, apart from the merits of the case, the defendants were quite right when they urged as a matter of law in the first Court, and again in the Court of Appeal, that the two cases could not be heard together in this form against them. I think we are bound now in special appeal to give effect to their objection, even although it may not be possible for them to satisfy us that the decision which has been given in the suit is such as involves any substantial error or defect in regard to the merits of the case. If, however, it were necessary, in order to support the present determination on special appeal at which I have arrived, to find such error or defect, I should be prepared to presume that a decree between parties upon a record which did not separately represent the relations between the parties who ought on the facts to have been affected by it would work injury. On the whole, I think that the bringing of these four suits in one, under the allegations of one plaint filed by two separate plaintiffs jointly, was contrary to the law of Procedure of this country, and cannot be upheld, as it has not been acquiesced in by the defendants themselves, but, on the contrary, has been persisted on against their urgent protestations in every Court. On these grounds I think that the appeal must be decreed, and that the judgments of both the Lower Courts must be reversed. The appellants will recover their costs in all Courts.

Hobhouse, J.—I have had some hesitation in coming to the same conclusion as my brother Phear in this case; but, on further consideration, I am of the same opinion as he is. It seems to me, according to the wording of the law under Section 8, Act VIII of 1859, that when the law declares that causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit that we must hold that, by that provisions, it was intended to provide that when causes of action are not by and against the same parties, then such may not be joined in the same suit. When, therefore, such causes of action are joined in the same suit, it seems to me that they are joined contrary to law; and if they are joined contrary to law, then any decision which the Court may come to in such an action must be contrary to law, and being so, must be set aside.

Regular Appeal from Shahabad.

CASE 348 of 1867.
9th May.

Munoo Lall, (Plaintiff) *Appellant, versus* Baboo Bheetbhunjun Singh and others, (Defendants) *Respondents.*

Before *Loch* and *E. Jackson*, J. J.

Mr. R. V. Doyne and *Baboos Onoocool Chunder Mookerjee* and *Kalee Kishen Sein* for Appellant.

The Advocate General and *Baboos Juggoda Nund Mookerjee* and *Romesh Chunder Mitter* for Respondents.

The suit was brought to recover the amount of a loan with interest made by the plaintiff to Baboo Bheetbhunjun Singh under a bond, dated 9th October,

Held, by *Loch*, J., that an alienation by

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simple mortgage, subquesent to attachment is void as regards both the attaching decree-holders and all other decree-holders.

Held, by *E. Jackson*, J., that it is void only against the attaching decree-holder, and as respects all proceedings taken under the attachment by him

1863, by which Mouzah Shahpore, the property of the debtor, was mortgaged as security for the loan. The plaintiff seeks to have this property sold in liquidation of his claim, and to recover any balance from the person or other property of his debtor.

Bheetbhunjun Singh does not resist the claim. The other defendants give a general answer to the claim that the mortgage to plaintiff is of no effect, as the property was under attachment when the mortgage was made. Each of this class of defendants lays claim to portions of the property on special grounds, and the claim of each may be shortly stated as follows.

Jug Munder Dass held a decree for money against Bheetbhunjun, bearing date 3rd December, 1850, execution was taken out, property was attached on 4th March, 1859, and sale proceedings were about to be carried out, when the debtor filed a kistbundee, dated 2nd June, 1859, by which he pledged Mouzah Shahpore as security for the debt. As the money was not paid according to the terms of the kistbundee, the decree-holder attached the property on the 13th March, 1863, and proceedings to bring it to sale were going on, when the debtor agreed to sell a 4 annas share of the village to him in liquidation of his debt, and a deed of sale to that effect was executed on the 9th August, 1864.

Jonessur Doss says that he held the property on a zuripeshgee lease, bearing date 24th July, 1860, for Rupees 48,705; that, for a further consideration of Rupees 40,400, he obtained a conditional sale of the village on 28th October, 1862; that as the debtor failed to pay the money, he served a notice upon him of foreclosure, dated 14th August, 1863, and the year of grace having expired, the sale had become final; that afterwards, out of consideration to the debtor, he entered into a settlement with him, by which he sold 5½ annas share of Shahpore to defendant by a deed of sale, dated 9th August, 1864.

Doorga Doss and Bheemul Doss held a decree for money against Bheetbhunjun Singh, and attached the property of the debtor, who pledged Shahpore as security for the debt on 7th August, 1860. Further proceedings were taken in execution in 1863, when the property, on 12th June, 1863, was attached and advertised for sale; but these proceedings, as stated by Baboo Unnoda Pershad Banerjee, pleader for the appellant, were struck off on 8th September, 1863. Subsequently the defendants entered into an arrangement with the debtor who, by a deed of sale, dated the 9th August, 1864, transferred a 4 annas share of the village to him.

Lalla Choonee Lall and others held money decrees against the debtor Bheetbhunjun, and, in liquidation of their claims, purchased 12 annas of Mouzah Shahpore from him on 9th August, 1864. They had not taken out execution against the debtor.

It is contended before us that if the plaintiff's mortgage is invalid by reason of the existence of an attachment in execution for a decree when it was made, then for the same reason all the private sales made to the defendants are invalid.

Second.—It is urged that a mortgage of the kind made to the plaintiff, which was not a usufructuary mortgage, nor any transfer of possession, but merely a simple security for the payment of the debt, was not an alienation which would be void by reason of the existence of a previous attachment at the time the property was pledged. *Third.*—It is urged that the attachment is good only in favor of the party making the attachment, but it is not good against the whole world. Had Jug Mundur Dass not attached the property, Choonee Lall would not have been in a position to raise an objection to the mortgage. *Fourth.*—All four defendants dealt with Bheetbhunjun as if he were competent to deal with the property. Why should Bheetbhunjun have been incompetent to deal with plaintiff?

We concur with the learned Advocate General in thinking that we have nothing to do with the defendant's purchasers. We need not trouble ourselves to pronounce any opinion as to their validity, whether they are or are not so by reason of the existing attachment. We have only to deal with the plaintiff's case, and to determine whether his mortgage is valid, and enable him to sell the

property in suit, or whether it is an alienation as contemplated by Section 240 of Act VIII of 1859, and whether the attachments extend to the whole world or only to certain persons. The words of the Section run thus:—"After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, during the continuance of the attachment, shall be null and void." If then a mortgage after attachment is such an alienation as is contemplated by this Section, it is null and void. The learned Counsel for the appellant admits that a usufructuary mortgage would be such a transfer of possession as would come within the meaning of this Section, and would be void. What is the effect of a simple mortgage? It puts a burden upon the property, and renders it less valuable to the attaching creditor than it was before; and it in a measure defeats the object of an attachment which is to have the property liable to sale in the condition it was when the attachment was made. Though there is no transfer of possession, there is a transfer of rights and interests in the property to the injury of the attaching creditor. But the law forbids any private alienation of the property attached, whether by sale, gift, or otherwise. The word "ortherwise" must be explained by the two words which preceded it. If a usufructuary mortgage comes within the meaning of the word "otherwise," why not a transfer of rights and interests under a simple mortgage? The late Sudder Court, in a case reported at page 102 of the Sudder Decisions for 1859, held that a mortgage after attachment was invalid. It is not, however, clear from that judgment what was the exact nature of the mortgage in that case; but it appears to me that a mortgage of any kind is an alienation to a certain extent of rights and interests possessed by the mortgagor injurious to the creditor; and I think that when once the property has come into the custody of the law, the debtor can do nothing with it without the permission of the Court. Once it is attached, the property must remain in the condition it was at the time of attachment, unless, by permission of the Court, the debtor be allowed to make arrangement regarding it for the benefit of creditors.

Holding then the opinion that a mortgage of any kind comes within the meaning of the word "alienation" as used in Section 240 of Act VIII, we have now to consider what is the effect of an attachment in regard to creditors who have not attached the property of the debtor. Is the attachment by one creditor good for the protection of his interests only, or does it, so long as it remains in force, protect the interests of other creditors, and render any alienation of the property invalid as against them also? The point has, I may say, been determined above. Looking at the words of the law, it appears to me that any alienation of property, after and while under attachment, is null and void. Nothing can make such alienation good. The law says the alienation *shall be* null and void; and it does not limit this in favor of the creditor making the attachment, but in regard to the whole world. It, in effect, says that such alienation must be considered as if it had never been made. If this be a correct view of the law, then other creditors cannot be affected by an alienation which is declared by law to have no existence. Had the arrangement with plaintiff been entered into with the permission of the Court after hearing any objections the attaching creditor might have to urge, it would have been valid; but so long as the attachment is in force, and the property in the custody of the law, the debtor has no power to deal with it in any way, but must leave it in the condition it was when the attachment was made. Under this view of the law, it appears to me that the judgment of the Lower Court must be affirmed, and this appeal dismissed with costs.

Jackson, J.—I regret that I am obliged to differ from my learned colleague in in the view which he would take of Section 240, Act VIII of 1859. I admit that the words of that Section, read literally, and taken by themselves, are sufficient to bear out the view that all alienations made during the circumstance of an attachment are null and void. I concur with my colleague in considering

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that the mortgage to the plaintiff was an alienation, such as is contemplated by that Section. If there were any doubt upon the matter, the action taken upon the mortgage in this very suit would remove that doubt. The plaintiff, by this very suit, declares that the estate in question was to some extent alienated to him; at least so as to bar any further alienation until his claim against its former proprietor was satisfied. But admitting that the mortgage to the plaintiff was an alienation, I am of opinion that such alienation is, under Section 240, Act VIII of 1859, null and void only as against the decree-holder, who moved the Court to make the attachment, and as respects all proceedings taken by such decree-holder under the attachment. If, for instance, the decree-holder, who had caused the attachment, had proceeded to sell, the purchaser at the sale would hold superior rights to the mortgagee, and the mortgage would, as respects him, have been a null and void alienation. Similarly, if the subsequent sale to the decree-holder had been made under Section 243, Act VIII of 1859, through the Court, the alienation to the plaintiff would have been null and void as respects the purchase by the decree-holder. But it is a different question how far the attachment affects a subsequent private alienation by the debtor in favor of the decree-holder. I am inclined to think that the attachment does not protect any such subsequent private contract. By attachment, it has been held that the Court takes the attached estate into its own custody. But I think that it does so with the view of disposing of it for the benefit of the decree-holder in the mode prescribed by law, but not with the view of enabling the debtor and decree-holder to make their own private bargain regarding it. The only one of the defendants who had attached the debtor's estate, lost all benefit from that attachment when he did not carry on the legal mode of executing his decree, but entered into a private contract with the debtor; and alienations, which would have been void if he had proceeded to execute his decree, are no longer void if he fails to carry on the execution. I admit the point of law is a difficult one; the more so as the words of the Section may have a more extended meaning, and there is the fear that the decree-holder in this case may have been misled by those words. I shall be glad if the question can be referred to a Full Bench of the Court for final determination.

CASE 156 OF 1867.

15th May.

Regular Appeal from Chittagong.

Mohun Loll Sookul, (Plaintiff) *Appellant*, *versus* Goluck Chunder Dutt, (Defendant) Respondent.

Before *Bayley* and *Phear*, J. J.

Mr. R. E. Twidale and *Baboo Sreenath Doss* for Appellant.

Baboos Onoocool Chunder Mookerjee, *Unnoda Purshad Banerjee*, and *Sreenath Banerjee* for Respondent.

Difference of opinion as to the sufficiency of the accounts rendered by the mortgagee, and as to whether, on its being shown that a small sum was still due, the mortgagor's suit for redemption should be summarily dismissed, or he be allowed to pay the balance into Court.

Bayley, J.—The history and particulars of this litigation (commenced in 1852) is set forth in the first and following pages of the paper book. It is needless to recapitulate them now. Suffice it to say that we remanded this case on the 7th May, 1866, with these remarks:—

"The account which the mortgagee by law has to put into Court is not that of his agent or tehsildar given by the latter for his master's (the mortgagee's) information as to such agent's collections. The jumma wassil bakee paper, however, is this latter. The account to be put in under the law is one to be made, verified, and proved by the mortgagee himself in the way before indicated. The jumma wassil bakee papers, duly attested by those who prepared them, or who collected according to them, and supported by the receipts of the talookdars or ryots who also may be called to depose to those receipts, and to what was the real demand and balance of each of their respective tenures, may well be adduced to support the mortgagee's own account when made and put into Court under the law cited.

"In fact, the account required from the mortgagee is one setting forth what he has realized, from what portions of the mortgaged property, in what

terms or periods, with what loss and gain on the several assets, with what necessary deductions, and what remains there as the net profits which can be taken as actual realizations towards liquidating the sum due under the mortgage transaction."

Upon this remand the Lower Court held that the principal and interest had not been realized by the mortgagee when this suit was brought.

The plaintiff's suit was dismissed with costs.

Plaintiff appeals, and urges, *first*, that the accounts filed by the mortgagee are not as required by law, but mere abstracts of jumma wasilbakee papers already deemed insufficient.

Second.—That, in fact, no proper accounts were kept by the mortgagee, as admitted by him.

Third.—And that the defendant's towjee of 1190, filed by the mortgagee, was spurious and untrustworthy, and contradicted by the towjee and a Collectorate paper of the neighbouring zemindars filed by plaintiff.

Fourth.—That the defendant's towjee of 1190 refers only to Dunnipore, and not to six other villages, exclusive of Dunnipore.

The memorandum of appeal is a long argumentative statement as to the evidence, but the above are the essential matters of appeal before us for decision.

With respect to the accounts, I have to observe that their truth and correctness have been deposed to by Goluck Chunder Dutt, who managed the estates and prepared the accounts. He states that he himself prepared these accounts; that Kashee Mohun drew out the fair copies now filed in Court; that they have been prepared from the tehsildar's jumma wasilbakee and jumma khuruch papers; that besides the jumma wasilbakee and jumma khuruch accounts, defendants possess *no* other papers showing the collections from the estate; and that the kabooleuts and fysallahs (filed in the record) are the only documents they possess to show the areas of the lands held by the talookdars and ryots.

The original towjee of 1190, delivered by the mortgagor, and according to which the demand or jumma had been regulated, and original jumma wasilbakee papers from 1193 to 1242 have been filed.

Now as to the amount. It certainly is an account of receipts and disbursements during the incumbency of the mortgagee. I do not myself see that it is to be rejected, because it is based on private collection papers. The collection papers themselves would not be the account; but there is no reason why they should not afford the materials for the account, just as private memoranda are not accounts, but afford means, and legitimate means, to prepare a due account, such as a mortgagee has to give of his usufruct.

It is true that the defendants have shown that previously no accounts of the character of the balance sheet required by the law have been accurately or regularly prepared or kept. But the law only requires that the mortgagee's account of receipts and disbursements shall be made out, filed in Court, and then sworn to as correct by the mortgagee. Of course if such an account can be shown to be false or incorrect, it is open to the mortgagor to show that fact.

But I do not think that such fact is shown in this case. I do not see why the towjee of 1190 should be declared a forgery. No proof of this is on the face of it, or otherwise directly brought to bear on it. The date, 1190, is referred to by appellant as subsequent to the deed which was of 1189; and there is a difference of eight villages in the two papers. But if the towjee be forged, why could it not have been made to run, both as to date and details, in unison with the mortgage deed?

For my own part, too, I think that it is quite a common practice to specify or denominate the main village only when others are, in fact, comprised in it; and by custom, the one is understood to comprise the others. The taidad and the Collectorate chittas show that such was the case. What the Talook Magerra really was, was what had to be seen, and under that head the additional villages might well come. I think as to the taidad that the remark on the paper that it is not admitted to be correct, is no reason in itself for its

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having been rejected, because that was done under a general precautionary rule prevailing in all Collectorates as to such papers. It is notorious that these precise words can be found on records in every Collectorate in the country.

I concur, too, with the Lower Court that there is no reason that a towjee of 1190 should detail all under-tenures and areas. It was a rough memorandum of estimated assets which Lalla Tiluck himself thought sufficient, and those taking from him might, therefore, well adopt it, and it does not follow that they were to go beyond it, or lose their mortgage rights.

And, lastly, there is, I think, sufficient direct evidence from defendant's witnesses as to its genuineness and authenticity, especially to the signature on it being true. The towjee, moreover, spoken of by Kallee Dass, plaintiff's, witness, shows from its terms that this impeached one of 1190 was not so different as to warrant a conclusion that the latter is a forgery, or that the collections were not made according to it as they were according to Kalee Dass.

Again, this was a talookee collection, which is not evidently so direct a gathering into the land of the malick of all available assets as a ryotee one, and thus the mortgagee who represented the malick could not obtain the fuller rates which the talookdar might.

In respect to the evidence brought forward by either party as to the real rates, as shown by the judgments in certain rent suits, I think there is not much proof that the rate of Rupee half per kanee adopted by the Court was wrong, or that it is Rupees 2 per kanee as he alleges.

On the whole case, I do not see sufficient reason for saying that the decision of the Lower Court is so far substantially wrong that we should reverse it. I have, however, doubt as to whether 5 per cent., and not 10 per cent., for collection charges, is not enough in a talookdaree mehal, as defendant admits this to be. Thus, with this exception, I would dismiss this appeal with costs.

I should be glad if the mortgagor could be allowed to redeem on paying what the Court, after a full trial and adjustment of accounts in a suit, might deem due. The mortgagor cannot always anticipate what will be the exact sum finally deemed due by the Court. But I think the rule of law stated in the three first lines of page 172, last edition, Macpherson on Mortgages, and the cases there cited (to which I know none opposed) are totally against this, the decision being to the effect that as long as there is any balance found due, no redemption can be decreed in that suit. I concur so far in the view of Mr. Justice Phear, that I think it would be indubitable, and only equitable and just, to allow redemption on immediate payment of such sum as may be found due by a Court. But as the decisions entirely conflict with this view, I would agree to the matter being referred to a Full Bench.

I find, however, that Mr. Justice Phear thinks that, although the practice has been contrary to the view he takes, it is not necessary to refer it to a Full Bench.

I entirely differ from this, and therefore can only say that I hold we must follow the practice, and I uphold the Lower Court's decision as it stands.

Phear, J.—I cannot say that I am satisfied with the manner in which the defendants have accounted. They are, in my opinion, bound to exhibit the detailed items of *all* their actual receipts and disbursements since 1189, M S., up to the time of accounting, verified by themselves, and accompanied by all vouchers. Both the towjee and the taidad, upon which so much importance has been set, are really irrelevant papers. If these are authentic, the first would show merely what amount would have been collected, had the collections been made at the original rates, and the second would perhaps properly lead to the inference that Dhurumpore in the towjee was comprehensive of six mouzahs besides Dhurumpore; but neither of these afford the least evidence as to the amonut of the collections, which were, in fact, made by the defendants during the period under account.

In truth, the only direct evidence of the collections is that afforded by the jumma wasilbakee papers and jumma khuruch papers, and these must be vague enough, if it cannot be shown from them that they cover all holdings in the

six villages alleged by plaintiff to be omitted from the account, as well as in the others. I confess I greatly distrust the story that these mortgagees have the during these large number of years (for much of which time they considered themselves absolute owners) kept no other zemindary accounts than the loose jumma wasilbakee and jumma khurruch papers which are filed in this suit. Indeed, I think there is much on the record to lead to the inference that they possessed in some other form minute details of the estate. The defendants should produce vouchers for every disbursement, or reasonably account for their not possessing such vouchers. No item should be allowed which is not either admitted by the plaintiffs, or supported by evidence of some sort. For instance, neither 10 per cent. nor 5 per cent. should be allowed for collection charges, but only so much as the expenses of collection actually amounted to; and if proper vouchers for this are not forthcoming, at least some evidence should be adduced sufficient to lead to a reasonable estimate of what the expenses under this head probably were.

On the whole, I am of opinion that the case should be sent back, in order that the account may be retaken, and I would reserve the question of costs until the result can be reported to this Court. I would further remove the cause into this Court for trial.

But even if the account found to be correct by the Lower Court be adopted, I think the suit ought not to be dismissed. I think the plaintiff ought to obtain a decree for reconveyance on payment of the balance found to be due, with interest and costs of suit, within a time specified. No doubt, it has been the practice of some of our Courts to treat a suit for redemption as if it were a suit for ejectment, in which the plaintiff could not have any decree, except by showing that every condition precedent necessary to entitle him to immediate possession had been fulfilled. This is particularly the case with the Courts of the North-Western Provinces. (See Sudder Dewanny Adawlut, North-Western Provinces, 1849, page 37). In the case reported in the 5th Volume, North-Western Provinces, Sudder Dewanny Adawlut, 1850, page 104, the plaintiff sued to recover possession of land by redemption of mortgage, alleging that the mortgagee had overpaid himself, and that there was a surplus due from him to the plaintiff. The Principal Sudder Ameen who tried the suit on regular appeal found that the plaintiff's allegation was not made out, and that there was still a certain balance (not distinguishing between principal and interest) due from the mortgagor to the defendant mortgagee; but he gave the plaintiff a conditional decree, to the effect that the plaintiff should recover possession on making good the balance. On special appeal against this decision, the Sudder Dewanny Adawlut declared that the Principal Sudder Ameen's decree was contrary to judicial usage, referring for authority to Bhubotu Singh *versus* Bheem Singh, Sudder Dewanny Adawlut, North-Western Provinces, 19th January, 1847, but giving no reasons for the usage, and dismissed the plaintiff's suit. So again, in VI. North-Western Provinces, Sudder Dewanny Adawlut, 1851, page 221, the Sudder Dewanny Adawlut is reported to have decided on special appeal that when, in a suit for the redemption of a mortgage, a balance is found to be due to the mortgagee, the course to be pursued is to dismiss the suit. And in Volume X. North-Western Provinces, Sudder Dewanny Adawlut, page 543, we find the Sudder Dewanny Adawlut repeating the same doctrine, and declaring that in a suit for redemption, if anything is due to the mortgagee, and plaintiff do not show that he had tendered that amount, his suit must be dismissed, for a decree cannot be given conditional on payment of the sum due. The practice of the Courts of Bengal appears to have been in this matter the same as that of the North-Western Provinces, although there are few, if any, decisions respecting it. Probably, the propriety of the practice was seldom, if ever, seriously called in question. The very ill-reasoned case (perhaps because badly reported) which is given in Sudder Dewanny Adawlut, 1849, page 392, seems to lay down that, in the opinion of the majority of the Court, the mortgagor has no right to have accounts rendered by the mortgagee, and taken by the Court, except when he is in a position to show that the mortgage is paid off. And the argument

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attributed by the report to the minority (namely, Mr. A. Dick) is even more untenable than I conceive this conclusion to be. I apprehend that this ruling is entirely opposed to the spirit of the Regulations. By Section 11 of Regulation XV of 1793, the mortgagor could require the mortgagee to produce and swear to his accounts in Court, and the Court was to adjust them. The Legislature evidently contemplated that the mortgagor should, when he desired, have the right to come into Court to ask for a judicial determination as between him and the mortgagee of the amount due on the mortgage; in other words, for a judicial determination which should be binding between him and the mortgagee, of the sum of money on the payment of which he should be entitled to obtain a reconveyance. This enactment was repealed by Act XXVIII of 1855, but substantially its provisions regarding the rendering and adjustment of mortgagees' accounts were reproduced. Regulations I of 1798 and XVII of 1806 have really no bearing upon this point. The first of these only gave the mortgagor certain practical facilities for establishing that he had complied with the terms of his agreement of mortgage, namely, that he had paid or tendered the amount due within the time specified in the mortgage; and the second gave him an indefinite extension of time for these purposes beyond the time so specified, subject to a right on the part of the mortgagee to terminate this extension by proper proceedings in Court. Both these regulations were passed for the benefit of the mortgagor, and neither of them in any way affected his right to require accounts from the mortgagee, and to redeem upon their adjustment, supposing him to do so in time. In the present case it has been decided by the highest authority that the plaintiff's right to redeem is alive. The suit before us is brought by him to make the defendant's, his mortgagee's, account and to have it declared on adjustment of their account that the mortgage is paid off, and that the plaintiff is entitled to recover possession of the mortgaged lands. No doubt the plaintiff has framed his plaint on his own view that the mortgage debt is already discharged, but substantially the suit is brought to ascertain, as between the parties, what is the state of the account, and I think the plaintiff is entitled to have the result judicially declared in a form which will enable him to recover by process of Court, if necessary, possession of the mortgaged lands on payment of the balance due from him, without bringing a fresh suit for that purpose. For my own part, I do not feel pressed by the contrary practice of the Court. We have full power to mould our decrees in such a way as best to meet the exigencies of each case. I do not propose here to declare anything with regard to the rights of the parties, beyond that which the Courts have always in effect done. I desire only not to stop at the mere declaration of these rights. I would go on to direct that the defendant should reconvey on payment by the plaintiff, and this direction would in no way alter the relative position or rights of the parties. It would only have the effect of possibly preventing the necessity for a future suit from arising. I see no reason to have recourse to the authority of a Full Bench to enable us to do this.

CASE 2184 OF 1867.

16th May.

Special Appeal from Shahabad.

Ram Lall Singh and others, (Plaintiffs) *Appellants, versus* Thakoor Dyal and others, (Defendants) *Respondents.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Unnoda Purshad Banerjee for Appellants.

Baboos Onoocool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

Under Act XVI of 1864, a suit lay in the Civil Court to compel registration refused by a Deputy Registrar on the non-appearance of the executing party.

Loch, J.—The plaintiff sued for confirmation of possession, for entry of their names in the Collector's Register in regard to 7 annas of Mowzah Karrungowan Aslee Mai Dakhilee, Pergunnah Champore, and to set aside certain zuripeshgee ticca leases in favor of defendant No. 2, and the kutkina held by defendants Nos. 3 and 4 from defendant No. 2.

It is stated that plaintiff purchased the property in question from defendant

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No. 1 on 20th August, 1865, and was put into possession; that his possession was disturbed by the defendants Nos. 2, 3, and 4, who, in collusion with the defendant No. 1, had set up certain leases, under which they claimed to hold possession.

It appears that, after the plaintiff had made the purchase, he applied on 26th August, 1865, to have his deed registered. As the vendor did not attend to admit the execution, and the Deputy Registrar, under the law then in force, Act XVI of 1864, had no power to compel his attendance, he, on the 9th September, 1865, refused to register the deed, and referred the plaintiff to the Civil Court. An application was then made to the Principal Sudder Ameen on the 18th September, 1865, under Section 15, Act XVI of 1864, praying that an order might be issued directing the vendor to register the deed; and, after hearing what the vendor had to say, who admitted the execution, but pleaded that the whole consideration had not been paid, the Principal Sudder Ameen, on the 25th November, 1865, directed the registration to be made, and in compliance with this order, the Deputy Registrar registered the plaintiff's deed of sale on 24th February, 1866.

We do not understand how any question as to plaintiff's title could have been raised in this case. Looking at the written statement of the defendant's vendor, we find that he admits execution of the deed, but denies the plaintiff's possession, and the payment of full consideration. The other defendants plead to hold under a lease received from the original proprietor, and state that, under a note of assignment from their lessor, they pay their rents to some party other than plantiff. Plaintiff's title was not called in question, only his possession and payment of consideration, and both these points have been determined in plaintiff's favor. As, however, the question of plaintiff's title has been gone into, and the Judge, relying, though reluctantly, on a judgment of a Division Bench of this Court, reported in 2 Wyman's Reporter, page 174, has dismissed the plaintiff's claim on the ground that, under that ruling, the Principal Sudder Ameen had no jurisdiction to direct the registration of the deed under the provisions of Section 15, Act XVI, 1864, and that the registration so made is null and void, and that consequently plaintiff's deed cannot be admitted in evidence, we must dispose of the question as brought before us in special appeal.

We find that, under the provisions of Section 29, Act XVI of 1864, the Deputy Registrar refused to register the deed, as the vendor did not appear to admit execution, and this order is perfectly correct. The plaintiff then applied to the Principal Sudder Ameen, under Section 15 of the Act, for an order directing the Sub-Registrar to make the registry. This order he obtained on 25th November, 1865. His application to the Principal Sudder Ameen was made on 18th September, 1865, within nine days from the Deputy Registrar's order, and he obtained the order for registration within four months of the same date. But it is urged, and the contention is in a measure supported by the decision of this Court quoted above, that as the order of the Deputy Registrar was correct, no application could be made to the Civil Court; that it is only in cases where the order of the Deputy Registrar is improper that such application can be made.

Looking at the terms of Section 15, we think that this contention cannot be maintained. The opening words of Section 15 are:—"If a District Registrar or Deputy Registrar shall refuse to register an instrument falling within the provisions of Section 13, it shall be lawful for any person interested to institute a regular suit to establish his right to have such instrument registered." It concludes with these words:—"The petition of plaint in any suit instituted under this Section shall be written upon paper bearing a stamp of the value of eight annas." And it may be remarked, in passing, that no time for filing such suit is specified, and therefore it may be presumed that the general Law of Limitation is applicable to such suits.

The new law, Act XX of 1866, has changed the regular suit into a simple application, and limited the period within which such application may be presented to thirty days. (See Sections 83 and 84) It appears to us that the law permits an application or suit under Section 15 in every case in which the Deputy Registrar refused to register, and the reason for allowing

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this was, that the Deputy Registrar had no authority to make enquiries as to the right of the party applying to have the deed registered. All that he could do was to refuse to register if the party executing refused to attend, or attending denied execution. He had no authority to enquire whether the deed had or had not been executed; and as deeds of the kind before us are obliged to be registered within a limited time after execution, it was necessary to provide some means to give relief to parties whose deeds the Deputy Registrar for any reason refused to register; and this relief was given, I apprehend, by the provisions of Section 15, which afforded a speedy mode of enquiry into the right of the party interested to have the deed executed. Were it otherwise, we should have this injustice under color of law, that a party after receiving consideration, and executing a deed of sale, might refuse to attend at the Registrar's Office to admit the execution. That Office could only in such circumstances refuse to register the deed; but as his order was a proper one, the party would not be able to take advantage of the provisions of Section 15 of Act XVI, 1864, and would lose the benefit of his title-deed, which could not be produced in evidence.

But we do not think that the present case is on all-fours with the case quoted by the Judge. In that case the Lower Courts refused to entertain any application under Section 15. In this case the Principal Sudder Ameen admitted the application, and, after hearing the parties, directed the Deputy Registrar to register the document, which was duly carried out. This order, whether right or wrong, was the order of a competent Court having jurisdiction in the matter, and we do not think that the Judge was in a position to set aside or look behind the order passed by the Principal Sudder Ameen. He was bound to accept it as an order of a competent Court, leaving any party dissatisfied therewith to take such steps as he should be advised to do to have it set aside. He could not in this appeal set aside an order which had become final. We think therefore that the order of the Judge must be reversed, and that of the first Court restored. The special appellant will get his costs in all Courts. The special appellant will pay the costs of the lessee, who has unnecessarily been made a respondent in this appeal.

The order in this will govern case No. 2185.

Mitter, J.—I concur with my learned colleague in both these cases. I think that the validity of the registration of the plaintiff's kobala is no longer open to be questioned by the vendor respondent. The registration has been effected in pursuance of a decree of the Civil Court that has become final by operation of law. I do not think that there is the slightest reason for contending that this decree is vitiated by want of jurisdiction. It was passed in a suit of a civil nature, and, whether the provisions of Section 15, Act XVI of 1864 were applicable to it or otherwise, it is perfectly clear that, in the absence of any legislative provision to the contrary, the Civil Court had ample jurisdiction to entertain it. The utmost that can be said is that the Principal Sudder Ameen who decided it had committed an error in law in acting upon a document which he had no power to act upon under the provisions of Section 13. But this objection, if it has any force at all, cannot amount to want of jurisdiction. Every error of law that is committed by a Court of Justice is not to be considered as an illegal assumption of jurisdiction, and I do not see any reason why the error complained of in this case, if it were an error at all, should be considered in that light. Holding this view of the case, I am of opinion that these two special appeals ought to be decreed with all costs in all the Courts.

Special Appeal from Gya.

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CASE 1714 OF 1867.

Gunnoo Singh and others, (Defendants) *Appellants, versus* Bhooa Kooer, (Plaintiff) *Respondent.*

Before *Loch* and *Dwarka Nauth Mitter*, J. J.

Baboo Khettur Nath Bose for Appellants.
Messrs. C. Gregory and *R. E. Twidale* for Respondent.

Plaintiff gave defendant a mokurreree lease, and took from him an engagement that the lease should be cancelled whenever plaintiff should pay back the bonus he received for granting the lease. *Held*, that the transaction was not a zuripeshgi or usufructuary mortgage, and plaintiff could not sue to eject defendant, on the ground that he had realized the bonus from profits of the land.

The following points have been urged before us in this special appeal :—

First.—That the ekrarnamah of the 24th April, 1829, relied upon by the plaintiff, now respondent, has not been proved by legal evidence.

Second.—That the Lower Appellate Court is wrong in treating the transaction between the parties as an usufructuary mortgage.

With reference to the first point, we are of opinion that the contention of the special appellant must fail. The ekrarnamah in question is an ancient document, purporting to have been executed and registered on the same date and attested by the same witnesses as the mokurreree pottah granted to the ancestor of the special appellants. It has been produced from the proper custody, and the respondent has even gone to the extent of proving the signatures of the attesting witnesses who are dead. Under such circumstances, the Judge below was fully justified in dispensing with the direct proof of its execution; and his finding in favor of its genuineness being based upon inferences and presumptions arising from the record, this Court is not competent to interfere with it in special appeal.

With reference to the second point, however, we are of opinion that the decision of the Lower Appellate Court is not correct. The transaction between the parties is evidenced by a mokurreree lease granted in perpetuity by the predecessor of the respondent to that of the special appellants, and an ekrarnamah of the same date, whereby the latter bound himself and his legal representatives to relinquish the mokurreree whenever the nuzuranah or bonus paid by him on account thereof should be repaid by the former or by his heirs-at-law. We do not see the slightest reason why a transaction of this sort should be dealt with as an usufructuary mortgage. That it is not a transaction of the nature of bybillwaffa or kutkubalah, is perfectly clear; for, irrespective of other objections, there was no definite term fixed for the repayment of the nuzuranah money, on the expiration of which the mortgage could have been foreclosed; and yet this is one of the essential characteristics of a bybillwaffa transaction as defined in the preamble of Regulation XVII of 1806. Nor can it be treated as one of those mortgage transactions that are generally known by the name of zuripeshgee leases. It is indeed true that temporary leases of land in the province of Behar, accompanied by bonds executed by the lessors for sums of money advanced to them as loans, and payable with interest, in some shape or other, within definite periods of time, have been recognized by our Courts as zuripeshgee mortgages; but the only ground upon which they have been regarded in such a light is that of custom. The transaction before us, however, is of a totally different character, and it is admitted on all sides that no such custom can be pleaded as to convert it into one of mortgage. Under such circumstances, we do not see the slightest reason for putting a construction upon the documents before us other than that which is strictly warranted by the plain language used by the parties themselves. The real contract between the parties, therefore, was a mokurreree lease, subject to the condition of being cancelled whenever the bonus paid for it by the lessee should be refunded to him or to his legal representatives; and the plaintiff is consequently incompetent to ask for the recovery of the mokurreree property, upon the simple ground that the amount of the bonus, together with legal interest thereupon, has been realized from the usufruct. The special appeal is accordingly decreed, and the suit, as brought by the respondent, is dismissed with costs.

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CASE 2527 OF 1867.

Special Appeal from Tirhoot.

Muhorum Misser, (Plaintiff) *Appellant, versus* Khugput Doss, (Defendant) *Respondent.*

Before *Kemp* and *E. Jackson.* J. J.

Baboos Chunder Madhub Ghose and *Kallee Kishen Sein* for Appellant.
Baboos Poorno Chunder Shome and *Turrucknath Dutt* for Respondent.

A mortgagee is not bound to give notice of foreclosure to the assignee of mortgagor, as well as to the mortgagor, unless perhaps it be shown that he was aware of the assignment.

The special appellant is the mortgagee. The mortgage is of date prior to the purchase, under which the defendant derives title. The special appellant foreclosed his mortgage, and obtained a decree for possession after suit for the same.

The special respondent is a subsequent purchaser from the mortgagor. He has also obtained a decree for possession; and, on proceeding to enforce his decree and obtain possession, the plaintiff brings this suit under Section 230, Act VIII of 1859.

The Moonsiff decreed the plaintiff's claim.

The Additional Judge observes that the plaintiff's claim "turns to some extent upon the genuineness of his mortgage." He goes on to observe that he does not declare that the mortgage is false; it may be true, and the plaintiff may really hold a valid lien on the estate; but it has not been proved. Further, that as the mortgagors had sold their equity of redemption to the defendant, the plaintiff was bound to serve the notice of foreclosure on the assignees of the mortgagor.

The case of the plaintiff was dismissed by the Judge.

In special appeal, it is contended that the Judge ought not to have tried the question whether the mortgage was genuine, but whether it was collusive, and that the *onus* of proving collusion was upon the defendant; that the Judge ought to give the plaintiff an opportunity of producing the evidence to the genuineness of the mortgage, which evidence was in another case, and had been admitted by the Moonsiff without sending for the witnesses, the opposite party not having objected to this. Lastly, that the Judge is wrong in law in holding that it was necessary to issue notice on the assignee of the mortgagor, he not being the legal representative of the mortgagor.

The special respondent takes an objection on cross-appeal, to the effect that the plaintiff's suit would not lie under the provisions of Section 230 of Act VIII of 1859.

We think that the suit was rightly brought under Section 230. The defendant took out execution of his decree, and got orders to be put in possession. Moreover, this plea was not taken below.

The plaintiff coming into the Court under Section 230 must prove his title, and we fail to see any distinction between the genuineness of the mortgage and the question of its being collusive. If collusive, it could not well be genuine, and *vice versâ.* The plaintiff had to prove his title, and the *onus* was upon him. The Moonsiff relied upon the evidence taken in the suit brought by the plaintiff for possession, in which suit plaintiff had to prove his mortgage. The Moonsiff was clearly wrong in doing so, and thus depriving the plaintiff of the means of proving his case by primary evidence. The Judge before finding, though he does not do so with any precision, that the mortgage was not proved, ought to have given the plaintiff an opportunity of examining the witness to the transaction, and we remand the suit for that purpose.

With reference to the question of notice, there are precedents of this Court, *vide* Marshall's Reports, page 292, and Weekly Reporter, Vol. III, page 231, that a notice on the mortgagor is sufficient, and that it is not necessary to serve a notice on the assignee of the mortgagor. Moreover, it has not been shown that the mortgagee had notice of the assignment. If this could have been shown, it may be that, under the ruling of the Privy Council, page 20, Vol. I, Weekly Reporter, a notice on the assignee would have been

necessary to render it effectual; but as there is no evidence that the mortgagee had notice of the assignment before he applied for foreclosure, the decision of the Privy Council is not in point.

We remand the suit. The Judge will give the special appellant an opportunity of examining his witness, to prove the *bona fides* of the mortgage. If the mortgage be proved, the plaintiff's right to be kept in possession, his mortgage being prior to the defendant's, is clear.

Miscellaneous Appeal from Mymensingh.

CASE 104 OF 1868.
19th May.

Chundrabullee Debia, (Objector) *Appellant, versus* Mr. Brody, (Decree-holder) *Respondent.*

Before *Kemp* and *Glover*, J. J.

Mr. G. C. Paul and *Baboos Onoocool Chunder Mookerjee* and *Kalee Prosonno Dutt* for Appellant.

Baboo Shusheebhoosun Sein for Respondent.

The decree-holder in this case, Mr. Brody, endeavoured to take out execution against certain mesne profits and costs which had been decreed to his judgment-debtor, Bhoobun Moyee Debia, by the Privy Council decision of the 26th of May, 1865.

Whatever accumulations may have been made by a Hindoo widow in possession during life, at her death lapse to the husband's estate, go to his next heir, and are not liable for her debts till it be shown in regular suit that a legal necessity existed for the contracting of those debts

Bhoobun Moyee died before execution was taken out, and the decree-holder's claim is objected to by the person who has succeeded to the property, Chundrabullee Debia, the mother of Bhoobun Moyee's husband, and next heir, on the expiry of Bhoobun Moyee's life interest, as widow of her husband.

Chundrabullee Debia denies that the wassilat, &c., decreed by the Privy Council belonged absolutely to her daughter-in-law, or can be made liable for her personal debts. They formed part of the estate of the deceased husband to which, and not to Bhoobun Moyee's estate, she, Chundrabullee, has succeeded.

The Principal Sudder Ameen held that the liability or otherwise of Bhawanee Kishore's estate for the particular debt claimed by the decree-holder could not be determined in the execution department, but must form the subject of a regular suit.

But he allowed the decree to be satisfied from the mesne profits, rents, and costs which the judgment of the Privy Council had declared to be the right of Bhoobun Moyee, on the ground that as she would have had absolute control over these sums, had she lived, they became her sole and particular property out of which her liabilities could be satisfied.

Against this decision Chundrabullee Debia appeals, urging that whatever accumulations may have been made by Bhoobun Moyee, these at her death became part and parcel of the estate, and as such passed to appellant as next heir of her son, Bhowanee Kishore. By Hindoo law, Bhoobun Moyee was allowed to make the fullest use of the usufruct of the estate so long as she lived, but whatever part of it she left behind became the property of the next heir, and was not liable for the widow's personal debts. If the decree-holder wished to make the estate liable, on the ground that the debt was incurred for some one of the necessary purposes which the Hindoo law allows, he could establish his claim in a regular suit.

It seems to me that the decree-holder must fail in this application, and that he cannot use the decree in favor of Bhoobun Moyee as that lady's personal property. To do so, it must be shown that the decree was of the nature of "streedhun," and it certainly cannot be contended that it comes under any of the six descriptions of property mentioned in the Dyabhaga as "streedhun."

A Hindoo widow, with a life interest in her deceased husband's estate, would be entitled to make the fullest use of the usufruct of that estate; and it seems doubtful, under the late rulings of the Privy Council, whether

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she could be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income, and made no attempt at alienation. If, on the contrary, she chooses to economise, she can, during her lifetime, give away her savings to any one she pleases; but if she have left savings undisposed of at the time of her death, these would form part of the estate, and go with that estate to the next heir of her deceased husband. Now, the decree sought to be attached in this case must be taken as representing a certain part of the usufruct of the estate which Bhoobun Moyee did not expend during her lifetime, and which, therefore, at her death, ceased to belong to her. It is argued that the money advanced by Mr. Brody was employed in getting the Privy Council decree, and that it therefore represents the actual usufruct of the estate which Bhoobun Moyee ought to have enjoyed during the time she was kept out of possession, and which she did enjoy in this manner.

But supposing this to be so, the difficulty in the decree-holder's way would be still the same. Bhoobun Moyee might, during her lifetime, have taken out execution of her decree, and have spent the proceeds, but the fact remains that she did not do so, but left the decree behind her untouched.

After hearing the arguments on both sides, and referring to the text books of Hindoo law, and the cases decided under them, I am of opinion that no amount of accumulations which a Hindoo widow may leave behind at the time of her death, can be considered as belonging to her, but that they must go to swell the estate. And it is not unreasonable that this should be so. A Hindoo widow is supposed by law to take her husband's estate for maintenance only, and she is most strictly enjoined to live a life of economy, austerity, and seclusion, expending the proceeds of her estate on religious observances for the good of her husband's soul. She gets these somewhat anomalous privileges, and by them keeps her husband's nearest of kin out of property, to which he has a much stronger claim than herself, because she is prevented by law and custom from contracting any other marriage, and without such privileges she might be thrust out to starve. But it was never contemplated that she should expend the produce of her estate wastefully, or do more than support herself in a decent and proper manner, and that she should leave to her own relatives, or convert into her own streedhun, the accumulations she might have made, appears to me opposed to every principle of Hindoo law as applied to widows.

It seems to me, therefore, that the decree sought to be attached cannot be made liable for any personal debts of Bhoobun Moyee.

The decree-holder can of course recover his money if he can show that the estate was bound for the debt; that is to say, that when the money was borrowed, the lender, after making due enquiry, was satisfied of the existence of a reasonable credited necessity, such as the Hindoo law allows.

I would therefore allow the appeal, and reject the decree-holder's application to take out execution with costs, and would pass the same order in the seven other cognate cases which are on all-fours with this.

Kemp, J.—I concur generally in this judgment. The decrees obtained by Mr. Brody were on confession of judgment. The debts, as far as the decrees are guides to the character of the debts, were personal debts of the life tenant, Bhoobun Moyee. Whether the estate of her husband, Bhowanee Kishore, is charged with these debts, will depend upon whether they were contracted under a legal necessity, and for the benefit of the estate. This question cannot be tried in this stage of the case.

The opposite party, Chundrabullee, does not succeed to the estate of the judgment-debtor, Bhoobun Moyee, but as heiress of her son Bhowanee Kishore, Chundrabulee takes the corpus of the estate, as well as all increments on that corpus, such as accumulations of profits, wassilat, costs, &c., not enjoyed by the life tenant. She succeeds to the residue of the estate after the widow's use of it. These accumulations cannot be considered to be the "streedhun" of the widow, for they do not fall within any

of the classes enumerated in the Dyabhaga as constituting a woman's separate or peculiar property.

I would reverse the order of the Principal Sudder Ameen. This decision will govern Nos. 105, 106, 107, 108, 109, 110, and 111.

Special Appeal from Midnapore.

CASE 2531 OF 1867.

19th May.

Kumla Kanth Mytee, (Plaintiff) *Appellant, versus* Sreemutty Narainy Dassee and others, (Defendants) *Respondents.*

Before *B. S. Jackson* and *Dwarka Nauth Mitter*, J. J.

Baboos Mohendro Loll Shome and *Bhowanee Churn Dutt* for Appellant.
Baboo Ashootas Dhur for Respondents.

The fact that the year of grace expired on a holiday does not give the mortgagor a day's more time.

In this case we think that the decision of the Zillah Judge is erroneous. He has determined that, inasmuch as the Civil Court was closed on the day on which the year of grace allowed to the mortgagor expired, the deposit was properly made on the first day on which the Civil Court sat after the holidays.

The question does not arise in this case whether the year of grace is to be computed from the date of the issue of notice to the mortgagor, or from the date on which the mortgagee's petition was notified to the mortgagor, because more than a year had elapsed since either of those dates before the deposit was made in the present instance. But assuming that the latter of these two dates is the time from which the year of grace is to be computed, it appears to us that it would be necessary to make a deposit in the Civil Court strictly within the year; and that the mortgagor is not entitled to the deduction of any holidays which may occur at the time when the year of grace expires.

Sections 7 and 8, Regulation XVII, 1806, allow the mortgagor an alternative; that is to say, he is permitted either to tender the amount due to the mortgagee, or if he prefers it, for his protection, he may deposit the amount in the Zillah Court. But in any case the tender or deposit is to be made within the "reasonable and limited time" referred to in Section 1 (or the preamble) of that Regulation. If the party paying the money desires, for his own safety and convenience, to deposit it in Court, he must avail himself of this privilege at a time when it is within his reach.

The authorized holidays of the Civil Court are always notified beforehand, so that parties may know when resort to the Civil Court is open to them; so that if the year of grace falls upon a day when the Civil Court is closed, it is the business of the party to come at some previous time. If we were to hold otherwise, we should be allowing the mortgagor to extend the year of grace at pleasure.

He might say:—"If I pay the money to the mortgagor, I must do it within one year, but if I pay it into Court, I shall have thirteen or fourteen months."

The decision of the Lower Appellate Court is set aside, and that of the Court of first instance is restored with all costs.

Special Appeal from Rajshahye.

CASES 2296 TO 2303, AND 3284 TO 3286 OF 1867.

20th May.

Zumroodoonissa, (Defendant) *Appellant, versus* Radha Churn Ghuttuck, (Plaintiff) *Respondent.*

Before *Macpherson* and *E. Jackson*, J. J.

Baboo Nulleet Chunder Sein for Appellant.
Baboos Chunder Madhub Ghose and *Sreenath Dass* for Respondent.

Held, by the senior Judge, that a

Jackson, J.—I would dismiss these appeals. They are for the mesne profits of certain lands from which the defendants had forcibly dispossessed

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plaintiff restored summarily to possession under Section 15 of Act VIII of 1859, cannot sue for mesne profits for the time he was out of possession till he has proved his title.

the plaintiff, and in which the plaintiff was restored to possession in a suit under Section 15, Act XIV of 1859.

The plaintiff now sues to recover possession of the amount collected by the defendants during the period they held possession. The Judge has decreed the claim upon the strength of the possessory decree, without going into the title of the parties. It is contended for the defendants, on special appeal, that the plaintiff must prove his title before he can recover the mesne profits.

I admit that, as a general rule, mesne profits cannot be recovered until title is established. But the decree in the suit for possession is, in my opinion, sufficient title to recover from the defendants what the defendants have obtained by force and illegally. The title of the plaintiff to possession carries with it the title to recover the mesne profits during the time he was dispossessed. It may be that the defendants hold a superior title to the plaintiff, but it does not follow that they are entitled to retain these mesne profits, as it may also be that they labor under some disability in asserting their title. For instance, it may be that the defendants having been out of possession for more than twelve years are barred from a hearing on the question of title. In such a case it would not be right that the question as to whether the plaintiff should receive the mesne profits during the time he was forcibly and illegally kept out of possession, should depend on the decision on an issue as to whether the plaintiff or the defendant has the superior title to the land. The plaintiff, though holding an inferior title, would be entitled to the mesne profits.

Macpherson, J.—I do not concur in the judgment of Mr. Justice Elphinstone Jackson. I think that the appellants' first ground of appeal is good, and that the respondents are not entitled to a decree for mesne profits without proving their title. The mere decree in the suit for possession in no degree shows that the respondents have any right to the collections made by the appellants, and for all that that decree proves to the contrary, the appellants may be the persons lawfully entitled to them.

In each of these cases the decree of the Lower Courts is reversed, and the plaintiff's suits are dismissed with costs, both here and in the Courts below.

CASE 2375 OF 1867.

28*th May*.

Special Appeal from Backergunge.

Kalee Chunder Sein and others, (some of the Defendants) *Appellants, versus* Shaikh Adoo Plaintiff, and others, Defendants, *Respondents.*

Before *Phear* and *Hobhouse*, J. J.

Baboos Kallee Mohun Doss and *Greeja Sunkur Mozoomdar* for Appellants.
Baboo Romesh Chunder Mitter for Respondent.

Possession is only evidence of title. Where plaintiff, prior to his ejectment by defendant two years ago, had held undisturbed possession merely on a pottah from a lessor whose title he could not prove, he cannot be restored.

This suit was brought to obtain possession of one beegah and some odd cottahs of land which the plaintiff alleges belonged to a certain howala in Talook Kally Chunder Chuckerbutty, appertaining to a certain share of the zemindary of Pergunnah Sullemabad. The plaintiff further alleges that he was ousted from the possession of this land in Bysack, 1270, by the defendant, and the suit is brought in Maugh, 1272. Both the Lower Courts have given the plaintiff a decree for possession, and this special appeal is brought upon two written grounds against the decision of the Lower Appellate Court.

The first observation that it occurs to us to make is that, inasmuch as the ouster occurred to the plaintiff in 1270, while the present suit was not instituted till 1272, the plaintiff is not entitled to succeed, on the reason prescribed (under certain circumstances) by Section 15, Act XIV of 1859. He must succeed, if he succeeds at all, by proving that he has title to the land in suit, and, by reason of that title, has the right to eject the defendant

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from the possession of the land. As we have already mentioned, the specific title set up by the plaintiff was this,—that the land in question belonged to a certain zemindary. He said that it had been let to him, or to a predecessor of his, and afterwards enjoyed by him, under a pottah from the zemindar. The date of this pottah is not given in the pleadings, but it has been told to us that a renewal of it, or some confirmation of it, is dated in 1276. The defence of the other side is that the land does not belong to the howala, talook, and zemindary mentioned by the plaintiff; but, on the contrary, falls within another share of zemindary of the Pergunnah Sullemabad, and belongs to the defendant; and that he, the defendant, has had joint possession, for some time at least, with the plaintiff of it. We are not immediately concerned with the finding of the Court of first instance.

The Lower Appellate Court seemed rightly enough to have directed its attention, in the first place, to the case set up by the plaintiff. It also seems to have considered the matter of title put forward by the defendant, and then it says:—"This Court finds there are no satisfactory proofs filed by either party from which it can be elicited whether the lands belong to the one share of the zemindary, or to the other share of the zemindary." We conclude from this expression that the Court has come to the conclusion, *first*, that the plaintiff has not made out the root of his title, namely, that the lands in question belong to the zemindary, from the zemindar of which he obtained the pottah, and in whose right he has enjoyed the lands; as has also further found, what seems at first sight unnecessary at this stage, that the defendant also generally failed to make out, to the satisfaction of the Lower Appellate Court, that the lands in question belong to the zemindary which he mentioned. Further, the Lower Appellate Court goes on to say that it agrees with the Court of first instance "in preferring the plaintiff's proofs of possession to those of the defendants for the reasons detailed in the judgment of the first Court, inasmuch as the plaintiff's pottah looks old and insect-eaten, and is borne out by documentary and parol evidence under it." We understand the two portions of the judgment of the Lower Appellate Court which we have just read, taken together, to amount to this, that while the plaintiff has failed to make out the title of his lessors, he still has proved, to the satisfaction of the Lower Appellate Court, that he for a long time held possession of the land in question under a pottah from that lessor, until he was ejected in the mode which we are now going to take from the judgment of the Lower Appellate Court. On this point the Lower Appellate Court says that "the plaintiff was violently ejected by the defendant when ploughing his lands, and, on the other hand, as the basis of the defendants' rights, that is, the proprietors and subordinate holders, rests on the deed of sale of 23rd Assar, 1267, B.S., this document, to bring credit on it, ought to have been duly registered," and so on; and, finally, the Court concludes that this document of title set up by the defendant has failed as entirely as the title which the plaintiff has set up for his zemindary. So that the judgment of the Lower Appellate Court, on the whole, comes to this, that the plaintiff was in undisturbed possession of this land for a considerable period under a show of title from a certain person, but that he cannot, in this suit, make out the title of that person, his lessor; and, on the other hand, that while he was in that undisturbed possession, he was violently turned out by the defendants, who are equally unable to show any right or title to evict in that manner. Upon this finding of fact the Lower Appellate Court has given a decree for possession to the plaintiff.

It is objected on special appeal, to go back to the grounds, that the plaintiff having instituted this action after the period allowed for possessory actions by Section 15, Act XIV of 1859, is not entitled to get a decree for possession without proving his title. We do not say that the objection taken in this form is valid, for we are of opinion that the enactment to be found in Section 15, Act XIV of 1859, does not in any way affect the general law on these matters. We think that it was intended by that Section

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solely to give a special remedy for a particular kind of grievance, supposing the party aggrieved chose to go into Court for the purpose within a very limited time, namely, six months. Was it not for the advantages given by that Act, it might happen that a person in undisturbed possession of landed property might be turned out by a stranger, and might not be able to get back again without invoking the assistance of a Court of law; but if he did come into Court for the purpose of seeking to recover possession, inasmuch as he, by the very facts of the case, is out of possession, and his object is to eject one who has possession by the general rules of procedure, the burden would be placed upon him to prove a *primâ facie* title, before the defendant can be called upon to say anything in defence of his own case. Whereas, had it not been for the high-handed act of violence which had turned the plaintiff out of possession, the defendant could not have obtained the lands in question, except upon the same condition, namely, of his discharging the *onus* of showing a *primâ facie* title; and we imagine that the Legislature considered it advisable to do away with the opportunity, thus laying open to powerful persons of shifting by a wrongful act the burden of proof from their own shoulders to those of persons presumably less able to support it, and that it did so by providing that the person aggrieved, on coming into Court within the short period of six months, might be replaced in possession, with all the advantages incidental thereto, merely by showing that he had been in possession until he was evicted. I am reminded by Mr. Justice Hobhouse, in confirmation of the remark which I have just made, that the Madras High Court has, in a decision reported in the Madras Reports, Vol. II, page 313, expressed a like view of this Section. If this view be correct, it is obvious, as we have already said, that the fact of the plaintiff in the case not having, within the period of six months, taken the necessary steps to secure to himself the advantages which attach to the position of being the defendant in occupation of the land sued for, cannot possibly complain that the ordinary rules of procedure applies to him as a plaintiff out of possession seeking to take the property from the hands of the defendant, and that therefore the burden of making out a *primâ facie* title rests upon his shoulders. It seems to us, therefore, that the first of the grounds of appeal does not, in fact, raise any objection to the decision of the Court below.

The second of the written grounds of special appeal is expressed somewhat vaguely, and is perhaps not altogether pertinent to the case of special appellant. The argument which had been based upon it, and has been met at some length by the other side, amounts to this, that the Lower Appellate Court was wrong in giving a decision in favour of the plaintiff, as it appears to have done, judging from the terms of its judgment, based simply upon the mere fact of possession. It has occurred to us during the argument before us of this case, and indeed on other occasions, that the fact of possession as an ingredient in the contest between the parties, whether coming in on the one side or the other, has not been dealt with in its proper character by the advocates who have argued before us. Indeed, there are some cases, as it seems to us, in our books of reports which attach a greater virtue to a possession of land than we can at all see really belongs to it. In matters of this kind, possession, excepting in some few instances, and they are few indeed, where it is of such a length, and of such a character, as of itself to constitute title, is but evidence of title, and we believe that it is evidence of title for one reason only, namely, that undisturbed possession, without anything more, is presumed to be referable to rightful title and to absolute ownership. To that extent we are of opinion that in all cases undisturbed possession, if not further explained, is evidence of title, but even then it is only evidence of title; and it may be shown by the other side interested in the matter that the possession relied upon was not, in fact, referable to a title, such as would enable the party who adduced it to succeed in the suit. In the present case, as far as we can understand the judgment of the Lower Appellate

Court, that Court came to the conclusion that the plaintiffs had enjoyed possession of their property, which is the subject of suit, for a considerable time; and although it does not say it in so many words, yet it says enough to show that the possession it speaks of was an undisturbed possession, a possession as of right. If then this stood entirely alone, it would, we think, be very strong evidence of title and rightful ownership on the part of the person who had possession, and accordingly he would have a right to succeed upon that evidence alone, supposing the other side did not bring forward evidence of a better or prior title, or something which should explain the possession, and show that the presumption which *primâ facie* arises from the mere possession itself is ill-founded. Of course we need hardly add that when we say it seems to us that undisturbed possession is evidence of a rightful ownership, we mean that it is evidence of rightful ownership at the time of the possession. Obviously, some one other than the party so possessed may perfectly well and rightly become owner after him, or some other person may have been rightful owner before him. But to return to the particular facts of this case. While the Lower Appellate Court seems to find that the plaintiff had for a long period had undisturbed possession until he was violently ejected by the defendant, that Court also explains the possession by saying that it was possession under the pottah to which we have before referred, and therefore, *ex necessitate*, that it could not indicate a higher title than the title of the person who granted the pottah The Court, however, had previously said that it was not satisfied as to the title of the person who granted the pottah; not that it expressed itself in so many words, but it said that there were no satisfactory proofs that the land in question fell within the zemindary of the zemindar whom the plaintiff alleged had granted him the pottah. It seems to me, therefore, that, on the finding of the Lower Appellate Court, the plaintiff was not entitled to succeed. We think that the Court had, taking its judgment as a whole, in effect, come to the conclusion that the plaintiff had failed to make out his title to the land in question, and consequently we think that the Lower Appellate Court ought not to have given a decree to the plaintiff, admittedly out of possession as he was, which should oust the defendant from the possession which he certainly had enjoyed for the last two years, and which, therefore, was not in any sense a nominal possession, but was a substantive possession, in succession though it might be to that of the plaintiff.

There is, to our mind, a great distinction between the case where one who is not in the possession and enjoyment of property seeks to wrest such possession and enjoyment from the defendant, and the case where one who is in actual possession of the property sues for damages consequential on an alleged tortuous act done by another during his, the plaintiff's, possession. In the first case, the plaintiff cannot succeed unless he shows such a title to the property as entitles him to immediate possession. In the second case, actual possession, even without title to the property, confers on the possessor a right of action against any person who interferes with his quiet enjoyment, unless that person be the real owner. And this distinction in the nature of the two causes of action accounts for the occurrence of the phrase "simple possession is conclusive evidence as against a wrong-doer," which has been appealed to by the Advocate for the respondent. The rule embodied in this is not applicable when title, and not mere possession, is necessary to complete the plaintiff's right to sue; and in such a case possession is only evidence of title, and it is so simply so far, and no further than it affords ground for the presumption that it is referable to title. We think therefore that the appeal should be decreed, and that the plaintiff's suit should be dismissed with costs in all Courts.

Special Appeal from Tipperah.

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16th *May.*
CIVIL JURISDICTION.
RENT SUITS.

CASES 1995 TO 1997 OF 1867.

Kallee Churn Singh and others, (Plaintiffs) *Appellants, versus* Ameerooddeen and others, (Defendants) *Respondents.*

Before *Bayley* and *Macpherson*, J. J.

Baboo Otool Chunder Mookerjee for Appellants.
Baboo Romanath Bose for Respondents.

A right of occupation as a ryot may accrue to the holder of a service tenure apart from the service, and take effect after it has ceased. Such a right is not limited to those who till with their own hands, but applies to all who derive their profit direct from the produce, and not from rent.

Bayley, J.—It is admitted by the pleaders on both sides that these three special appeals will be governed by one and the same decision here.

The plaintiff in these cases sued under a jotedaree pottah of the 1st Assin, 1275, for rents against certain defendants as the actual cultivators.

These defendants did not appear.

The other defendants (certain palkee bearers) intervened under Section 77, Act X of 1859, and stated that the lands, the rents of which were sued for, were held rent free by them as service grants.

The first Court gave plaintiff a decree, holding that the land did not belong to defendants, the palkee bearers, as a service tenure.

On appeal, the Lower Appellate Court held that the defendants, palkee bearers, had been in possession of the lands, even if not doing service as bearers, for so long a period as to give them the right of occupancy under Section 6, Act X of 1859.

Against this holding the plaintiff appeals specially, and urges that it is clear from the kabooleut entered into by these defendants with the Rajah of Tipperah, that they have no other rights than to hold the lands as long as they perform the service of palkee bearers; that they have ceased to do that service; and that, consequently, their rights in their tenures have ceased also. Further, that the Principal Sudder Ameen has decreed their right of occupancy under Section 6, Act X of 1859, when they themselves did not set up originally any such right or plea, and indeed entirely abandoned these grounds of appeal in order to set up this one completely new defence, and that the Principal Sudder Ameen should not therefore have adjudicated the case upon it. The special appellants add that the specialrespondents are jotedars or middlemen, and not the actual cultivators, to whom alone Section 6, Act X, applies.

I am of opinion that it was quite open to the Lower Appellate Court to allow the defendants to amend their grounds of appeal, nor can I say that it has erred in law in doing so.

I further think that the benefits of Section 6 are not restricted to those who with their own hands till the soil, but to those who are *bonâ fide* actual cultivators in the sense that they derive their profits from the produce directly, and are not middlemen, who have no connection with the produce, except by receiving the rents in cash or kind from those who do directly derive their profits from the produce.

The cases cited, Weekly Reporter I, page 26, P. C., and VI, 80 and 206, do not go beyond the question of the right to hold service lands *as service lands* after the service has ceased. Those cases do not in any way refer to rights of actual cultivators under Section 6, Act X of 1859, irrespective of service.

On the whole, I see no ground on this petition of special appeal for interfering with the decision of the Lower Appellate Court, and therefore dismiss these three special appeals, Nos. 1995, 1996, and 1997, with costs.

Macpherson, J.—I concur in thinking that these appeals should be dismissed with costs. On the facts as found by the Lower Court, it appears to me that the Judge took a correct view of the position of the respondents.

1868.

23rd May.
CIVIL JURISDICTION.
RENT SUITS.

CASE 2474 OF 1867.

Special Appeal from Hooghly.

Muddoo Soodun Koondoo and others, (Defendants) *Appellants, versus* Juggessur Mookerjee, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Nilmadhub Sein for Respondent.

Where no notice of enhancement was served, a decree for enhanced rent will not affect arrears of past years.

This was a suit for arrears of rent at an enhanced rate from 1259 to 1273. The Deputy Collector gave the plaintiff a decree for such portion of the rent as was not barred under Section 32, Act X of 1859, *viz.*, for two years at the old rate, and one year at the enhanced rate.

In appeal, the Judge held that as the plaintiff, until the decision of the High Court, had no status on which to sue, inasmuch as until that date he did not know the rate of rent to which he was entitled, and that when he gained the decree in 1866 in the High Court, his cause of action arose, and as he has brought his suit within one year from the date of his cause of action, none of his claim is barred. Section 30, Act X of 1859, and Weekly Reporter, Volume VI, page 43, Act X Rulings, are quoted by the Judge.

We think that the Judge is wrong. Section 32, Act X, lays down that suits for recovery of rent shall be instituted within three years. Section 30 of the said Act refers to suits for which no term of limitation is otherwise provided by the Act.

The decision quoted by the Judge is not in point. In that suit a notice of enhancement had been served. The ryot had done everything in his power to protract the litigation, and the Judges said that if they applied the Law of Limitation, it would be depriving the zemindar of his rents, merely because his opponent was successful in protracting litigation for a period of more than three years.

In this case no notice was served. The plaintiff only got a declaratory decree of his right to enhance, and the decision declaring the right was to be held as a notice entitling him to rent at the enhanced rate only from 1273. There was nothing to prevent the plaintiff from suing for the old rent in due time. The status of defendant was not in dispute; the right to enhance was alone in issue. The decision of the first Court is affirmed, and this appeal decreed with costs and interest.

CIRCULAR No. 4.

1868.

HIGH COURT CIRCULARS AND LETTERS.

To

ALL SESSIONS JUDGES AND COMMITTING MAGISTRATES.

Dated Calcutta, the 6th May, 1868.

HIGH COURT, &c.
CRIMINAL SIDE.
Before *Peacock*, C. J., *Loch*, *Bayley*, *L. S*, *Jackson*, and *Macpherson*, J J
Sessions Courts' Statements and Returns.

Referring to the periods at which Sessions of Jail delivery now take place, and to the various changes which have been introduced by the Code of Criminal Procedure, and the Circular Orders of this Court, the returns at present submitted by the Sessions Judges are no longer perfectly adapted to the purpose for which they are intended, information on some important points not being found in them at all, and the statements being, on the other hand, encumbered with figures which may be found in the Magistrates' returns, and which it is not necessary to repeat. The rules relating to the holding of the Criminal Sessions also appear to be susceptible of improvement.

The High Court has consequently determined that the returns of the Court of Session, not relating to its appellate business, should be submitted at the close of each actual Sessions, and should be so altered in form as to exhibit more conveniently the result of the Sessions operations.

But as the Court of Session must frequently sit for the purposes of appellate jurisdiction, in order to the prompt decision of appeals and petitions coming before it, the returns of appellate business must continue to be submitted periodically, and the Court are of opinion that such statements may now be required not oftener than quarterly in the same manner as the Civil returns are now transmitted. The form of these returns has also been modified.

The statements, therefore, which the Courts of Session will hereafter submit (except the annual statements which will be dealt with in a separate order) are as follows:—

I. Quarterly.

I. A general abstract, of the business which has come in each quarter before the Court of Session in its appellate or superintending capacity. In this statement it is intended that appeals and applications of every kind made to the Court of Session should be exhibited. The form is so simple as to require no explanation.

II. Quarterly.

II. This statement, which is to accompany No. I, will exhibit the result of appeals and applications under Section 434 in detail, showing how the decisions and orders of each Magisterial Officer have been affected. This form is also exceedingly simple. Appeals in Criminal trials include such appeals under Section 409, Code of Criminal Procedure, and also under Section 410. Appeals in other cases include appeals against orders to give security for good behaviour, and any appeals allowed by law against orders not being convictions in criminal trials. Applications and requisitions under Section 434 have been entered under a separate head, because it has been thought expedient that the extent to which this provision of the law has been resorted to should be recorded, whether the Court of Session has acted on application, or of its own motion. Such application, when made by petition to the Court, and refused, will be entered in the same column as appeals rejected. When the record has been called for, but the proceedings have not been referred for the orders of the High Court, the case will be entered with orders affirmed. When such reference has been made, the case will appear under "orders reversed."

III, IV, and V. Jail Delivery Statements.

III, IV, and V will be submitted within a week after the close of each Sessions. Nos. IV and V are the same as the present returns bearing those Nos.

In the form which accompanies this C. O.

No. III is designed to exhibit the results of one Sessions at a single view. In it will be shown the cases of all accused persons who were in Jail or on bail at the commencement of the Sessions, awaiting trial before the Court of Session, and the mode in which each case and person was disposed of.

1868.

HIGH COURT CIRCULARS AND LETTERS.

The High Court has reason to believe that trials are sometimes too lightly postponed. It cannot be too often pointed out that a further detention of an accused person in Jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoners, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

The High Court, therefore, directs that at each periodical Session all persons awaiting trial be brought before the Judge in open Court; and if the Government Prosecutor should not be prepared to go to trial in any particular case, that he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. When any trial is postponed, the ground of postponement is to be shortly stated in the column of "remarks" in Statement No. III.

Offences are to be stated as concisely as possible, with the Section of Indian Penal Code (or other law) applicable, in the form given.

When solitary confinement is awarded, the fact (specifying the period) is to be stated in red ink in the column of "remarks" opposite the name of the prisoner so sentenced.

A sentence passed in addition to any other sentence in a different case passed at the same Sessions, or one which is to take effect on the expiration of another sentence which the prisoner may be undergoing, is to be similarly indicated.

Cases will be entered in the order of trial, so as to enable the Judge's clerk to place each case in the statement at the conclusion of the trial.

The smaller form given on the reverse side of this Statement is intended to show the number of witnesses and others who have come before the Court at each Sessions, and the time occupied in disposing of the cases collectively.

Part II.

The existing rule, under which in all districts the Sessions are to be held in each alternate month, is abrogated, and the number of Sessions and the time of holding them will now be left to the discretion of each Sessions Judge to be determined according to the varying circumstances of his district and the state of business therein.

The Judge will accordingly, in the first week of December in each year, fix the number of Sessions to be held in the year following, and the dates on which respectively they are to begin (the number varying with the estimate or average number of trials, and not being less than six, or more than ten, in each year), and the Magistrate of the District in communicationw ith all the Subordinate Magistrates who exercise the power of committing to the Sessions, and obtaining from them the particulars of all cases committed by them, will prepare and submit to the Zillah Judge, two days before the commencement of each Sessions, a Calendar of all such cases in the form annexed, which will be the basis of the Sessions Judge's Calendar (Statement No. III).

The document now misnamed a Calendar will be discontinued, and the names of the witnesses should be placed on the back of the charge sheet. The observations or judgment of the Magistrate in committing the prisoner will always go up in original with the record, where, with the original depositions, they should be read by the Judge before the trial. Abstracts of the evidence are considered unnecessary. and they are at times misleading.

The Magistrates will be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing Sessions, in order to avoid the needless detention of accused persons for prolonged periods.

Whenever a commitment is made, intimation will be immediately given to the Court of Session, through the Magistrate of the District, by a letter in the annexed form. It will be unnecessary for the Court of Session to send any answer fixing a date for the trial. But the Judge will be guided by the information which he thus receives in estimating the time which it will be necessary to devote to the Criminal Sessions, and consequently at what period he will be able to take up Civil business thereafter.

Prosecutors and witnesses will be bound over to appear "at the next Criminal Sessions commencing on "

But it will be the duty of the Magistrate, in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session, that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

The directions herein contained for committing Magistrates are to be observed, so far as they are applicable, by Civil Courts and other authorities committing persons for trial at the Sessions.

The rules now communicated will take effect from the 1st July next, and the Zillah Judges will be good enough to fix the Sessions for the latter half of the year in the first week of June. All such arrangements for the Sessions (both on the present occasion, and afterwards yearly) are to be immediately reported to this Court for approval, but may be carried out, unless the disapproval of the Court be communicated.

Form of letter to be sent by Committing Officers through the Magistrate of the District to the Judge.

FROM

Magistrate of

TO

THE SESSIONS JUDGE OF

SIR,

I beg to report that I have this day committed to take his trial before the Court of Sessions, the person named in the margin on the charge specified below.

I have, &c.,
A. B.,
Magistrate (as the case may be).

Charges.
1
2

(Form of District Magistrate's Calendar).

Calendar of accused persons for trial before the Court of Session.

SESSIONS OF 186 .

No of Case	Committing Officer.	No and Name of accused.	Charges and Sec, I.P.C.	Date of offence	Date of apprehension or appearance to summons.	Date of Commitment.	In Jail or on Bail.

Reference to the High Court from the Recorder of Rangoon.

1868.

18th April.
SMALL CAUSE COURT AND OTHER REFERENCES

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J. J.

The reference raised the following point:—

Whether a reference can be made to the High Court by a Recorder of British Burmah on a doubtful point in execution.

No reference can be made to the High Court of Calcutta by a Recorder of British Burmah on a point arising in execution of decree.

Judgment of the High Court.—The words of Act XXI of 1863, relative to the statement of a case for the opinion of this Court, are very similar to those used in the Small Cause Court Act II of 1865.

The construction put upon that Act was that a case could not be stated for the opinion of the High Court with reference to a point of law arising out of proceedings in execution of a decree; and we are of opinion that a similar construction must be put upon Act XXI of 1863.

By Section 23, it is enacted that the Recorder may pass a decree contingent upon the opinion of the High Court upon the point referred, but that no execution shall be issued in any case in which a reference shall be made until the receipt of the order of that Court.

Sections 24 and 25 provide for the mode of dealing with cases referred, and the latter part of Section 25 provides that when the High Court has heard and considered the case, it shall transmit a copy of its judgment to the Recorder, who shall, on the receipt thereof, proceed to dispose of the case conformably to the decision of the High Court. The Act evidently, as it appears to us, contemplates points of law which arise in a suit prior to decree.

Under these circumstances, we abstain from answering the second and third questions, as no legal effect can be given to them.*

The Small Cause Court Act has been amended by Act X of 1867, but that Act does not apply to the Recorder's Court.

Reference to the High Court from the Judge of the Court of Small Causes at Jessore.

18th April.

Sreeram Roy Chowdhree, Obligee, *versus* Koleemuddy Molla, Obligor.

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J.

No proceedings summarily to enforce a specially-registered bond can be taken in the Small Cause Court when the bond itself has been lost.

Case.—This is an application to this Court, under Section 53 of Act XX of 1866, to enforce the agreement recorded by the Registering Officer under Section 52 of the said Act on the bond or obligation, a true copy whereof has been filed with the application.

It appears from the statement set forth in the application that the original instalment bond is lost, and the pleader consequently asks this Court to give his client a decree for the amount mentioned in the application, or else to issue a notice to the obligor to attend and show cause why a decree, as prayed for, should not pass against him on the strength of the copy of the bond.

It appears to me that, under Section 53, the applicant is entitled to a decree only on production of the original *obligation*, and of the record signed, as mentioned in Section 52, and that he is not entitled to a decree on production of the true copy of the same, as in the latter event he would have to offer secondary evidence in consequence of the loss of the original obligation, and it must be shown to the satisfaction of the Court that diligent search has been made in those quarters in which the primary evidence was likely to be procured, and the obligor may be at liberty in a Court of Equity to call upon the applicant for a suitable bond of indemnity. It is not competent to me to enter into either of these matters under the

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* This being so, that part of the reference relating to these questions is not reproduced.

1868.

SMALL CAUSE COURT AND OTHER REFERENCES.

Section cited. The proper course, therefore, appears to me to be to refer the applicant to a regular suit, and that I ought to refuse to summon the obligor under the ruling in Kristo Kishore Ghose *vs.* Brojonath Mozoomdar, Wyman's Reporter, Vol. II, page 15, Small Cause Court Rulings. I, however, find that the new amended Civil Procedure Code now before the Council (Section 472) provides for the service of a notice on the person against whom the enforcement is applied for.

Judgment of the High Court.—We are of opinion that the Judge of the Court of Small Causes is correct in his view of the law. The petitioner cannot proceed under Act XX of 1866 without producing the bond.

25th *April.*

Reference to the High Court from the Judge of the Court of Small Causes at Jessore.

Ramnarain Doss Biswas, Obligee, *versus* Sreemunto Poddar, heir of Joshomunto Poddar, Obligor.

Before *Peacock*, C. J, and *Dwarkanath Mitter*, J.

The heir of an obligor cannot be summarily proceeded against under a specially-registered bond.

Case.—This is an application to this Court, under Section 53 of Act XX of 1866, to enforce the agreement recorded by the Registering Officer under Section 52 of the said Act on the bond or obligation filed with the application against the heir of the obligor, who is dead, and the pleader for the applicant asks this Court to issue a notice to the heir of the obligor to attend and show cause why a decree, as prayed for, should not pass against him, as this was the practice adopted by my predecessor; but as it has already been held by the High Court in Kristo Kishore Ghose *versus* Brojonath Mozoomdar, Wyman's Reporter, Vol. II, page 15, Small Cause Court Rulings, that a defendant ought not to be summoned under Section 53, I have refused to issue the notice as prayed for, and have referred the applicant to a regular suit, as it appears to me that the agreement recorded on the bond only binds the obligor, and not his heirs, and a decree can only be passed against the obligor under Section 53.

No doubt, by law, the heirs are answerable for the debts of their ancestors, as far as there are assets, but no further, and this question can only be decided in a regular suit, after summoning the defendants.

Judgment of the High Court.—We are of opinion that the Judge of the Court of Small Causes is correct in his view. The heir cannot be called upon summarily under the Section referred to.

JUNE, 1868.

E. T. TREVOR, ESQ., AND A. MONEY, ESQ., C.B.

No. 1.

The practice, in some instances, of resorting to the sale of Civil suit decrees in favor of Government, by public auction, when difficulty is experienced in realizing the amounts due, is irregular and inexpedient. District Officers should adopt every possible means for the realization of all such dues by regular process, but sales of decrees are prohibited.

No. 2.

District Officers are informed that the orders of Government issued through the Board's Circular* No. 4 of March, 1867, apply, as to the character of a license-holder, only to licenses granted to open new shops for the vend of spirits and drugs, and not to the mere renewal of licenses already issued in a previous year.

Board's Rules, Section II, Clause 2A., page 54.

The chief object is to prevent the existence of shops in localities where the authorities charged with the preservation of the peace think it undesirable to have a shop, and next to establish some check with reference to the character and qualifications of the license-holder.

2. When a shop has already been reported upon by the Police as unobjectionable, no second enquiry in regard to the locality is necessary on renewal of license.

3. When a shop has not been yet reported upon by the Police, the District Superintendent's opinion should be asked for on renewal of license.

4. Similarly, as regards the character of the license-holder, if he is a new applicant, the District Superintendent should be asked if he knows anything against him. If his license is merely a renewal, no enquiry is necessary

5. The District Superintendents of Police should be invited, however, to bring to notice any cases in which the holders of licenses appear to them to be unsuitable persons to continue as authorized vendors.

6. The District Superintendents should be at the same time desired to exercise this interference with due caution, reporting only such cases for a cancelment of license as may have been the subject of Magisterial enquiry, or have fallen under their own personal knowledge. It is certainly not desirable that objections should be raised to the holder of a license merely on the report of a subordinate Police Officer, and without a fair and proper enquiry by the District Head of the Police.

No. 3.

The accompanying Resolution of the Government of India, in the Foreign Department, No. 418, dated the 30th April, 1868, and of its enclosure, calling attention to the rules of Electric Telegraph Department, applicable to service messages, is published for the information and guidance of all Officers in the Revenue Department.

1868.

June.

REVENUE CIRCULARS.

From J. T. WHEELER, ESQ., Assistant Secretary to the Government of India, Foreign Department,—(No. 418A., dated Fort William, the 30th April, 1868.)

ORDERED, that copies of the following Resolution and of the Circular in question be forwarded to the Government of Bengal for the purpose indicated.

No. 418.

GOVERNMENT OF INDIA.

FOREIGN DEPARTMENT.

ELECTRIC TELEGRAPH.

Fort William, the 13th April, 1868.

READ Circular dated 18th June, 1864, No. 941, issued from the Home Department, calling attention to the Rules of the Electric Telegraph Department applicable to service messages.

RESOLUTION.—His Excellency the Governor-General in Council observes that these Rules are very far from being strictly observed; and as some time has elapsed since they were first promulgated, it appears necessary to call the attention of all Government servants, Civil and Military, to their existence.

His Excellency in Council accordingly resolves that the Circular cited above be re-published in the *Gazette of India*, and that copies be sent to all Departments, Governments, and Administrations, with a request that the orders may be extensively circulated among all Government officers; and that it may be intimated to all concerned that all messages regarding leave, pay, promotion, or appointment, or other matters of a private character, must be paid for by the person sending them, unless it is perfectly clear that the interests of the public service will be injuriously affected, unless the particular message in question be sent by telegraph.

The Military Department will also be asked to furnish copies to the Commander-in-Chief in the three Presidencies for communication to the Commanding Officers.

Circular from E. C. BAYLEY, ESQ., Secretary to the Government of India, Home Department, to Local Governments and Administrations,—(No. 941, dated Simla, the 18th June, 1864.)

SIR,

The Governor-General in Council finds it necessary again to call attention to the Rules of the Electric Telegraph Department applicable to service messages.

2. The periodical inspection of service messages undertaken in Calcutta shows that it is still a common practice on the part of Secretaries to Government, Heads of Departments, Officers Commanding Regiments, and other public officers, to communicate regarding applications for leave of absence and applications for appointments by telegraph on the public service.

3. Such communications are in fact very rarely required in the interests of the public service. In nine cases out of ten they are made for the private convenience of the party concerned, and therefore the messages ought not to be sent at the public expense.

4. If an officer seeking leave, or applying for an appointment, desires to receive a reply by telegraph, he should pay for the reply himself, for no such message can properly be sent at the public expense, unless it be so sent because it is in good faith believed that the interests of the public service require it.

5. The extent of the evil which results from the irregular practice above noted may not readily strike an individual public officer who may perhaps only send one or two such messages in a month. The evil, however, is in reality a very great one, for the irregularity is found to be prevalent throughout India wherever telegraphic communication is available, and thus probably not a day passes that private messages, which have been paid for, and messages which are really on the public service, are not delayed in transit by the passage of some of these unpaid private messages improperly sent on the public service.

6. The difference between the Post Office and the Telegraph in this matter is obvious, though there is reason to suppose that it is not always borne in mind. No one communicating with Government, or with any public functionary, is entitled to expect a reply by telegraph. *The telegraph is an extraordinary means of communication, which is not intended to be used in the transaction of public business, except on urgent and important occasions, and*

when the saving of time effected by the telegraph is of real importance to the public interests and it is of the utmost consequence to the interests of the general public, and also as regards the economical working of the telegraph, that this rule should be rigidly observed by all public officers, and especially by those who hold posts of authority.

7. Another common and very serious evil in communicating by telegraph on the public service is the entire absence of any care to express the messages in the fewest possible words. It should be always borne in mind that a message should consist of as few words as are consistent with a clear rendering of its meaning. It cannot be too strongly impressed on public officers that communications by telegraph must be conveyed in a style altogether different from that which is usual in postal communications. Brevity next to clearness must be considered the most important consideration in telegraphic messages.

No. 4.

The following changes should be made in Section XII, page 187 of the Board's Rules :—

Rule 1A should be cancelled, and in the scale of rewards for the destruction of noxious wild animals, in the column headed "Cossyah and Jynteah Hills," add the words "and the Districts of the Cooch Behar Division."

No. 5.

The following alterations should be made in Chapter IX, Section V, page 160 of the Board's Rules :—

In rule 3, after the word "Rai" omit the word "and," and add after Rai "Rai Bahadur," "Rajah."

Before the words "Khan Bahadur" insert "Khan," "Bahadur."

The following should be added as Rule 4 :—

4. The eldest son of a Hindu Rajah should be addressed as "Konwar," and the younger sons as "Miyan."

No. 6.

The following alterations should be made in Chapter XIV of the Board's Rules :—

In Rule 4, page 214, after the number 50 omit the comma, and add the word "to" and in the place of 78 substitute "79."

The following is to be added to the notes to Registers Nos. 81 and 82, at page 226 :—

"This Register should also be kept by a Sub-Divisional Officer, when he is authorized to issue Excise Licenses."

No. 7.

The following alteration should be made in Chapter XXI, Section V, Rule 1, page 307 of the Board's Rules :—

In line 7 for "50 Rs." substitute "100 Rupees." This alteration has become necessary owing to the extended jurisdiction which has been accorded to Moonsiffs by Act XVI of 1868.

No. 8.

The Government of India consider it highly desirable to discourage the practice, at present prevailing in several Districts, of allowing the public to employ largely Currency Notes solely for the purposes of remittance. The following alterations have accordingly been made in Rules 1 and 5 at page 25 of the Board's Rules :—

Rule 1.—Omit "freely and without enquiry," and add after the word "values" "they should not be issued, however, in exchange for cash, at surplus treasuries."

Rule 5.—Add after the words local circulation, "In complying with local demands, Collectors will, however, bear in mind that notes are not to be exchanged for cash at surplus treasuries."

Routine of Business of the High Court, in its Appellate Jurisdiction, to take effect on and from Monday, the 3rd of June, 1867, until further notice.

	1st Bench. (*Group A.*) The Chief Justice. Mr. Justice G. Loch. Mr. Justice Dwarkanath Mitter.	2nd Bench. (*Group B.*) Mr. Justice H. V. Bayley. Mr. Justice J. B. Phear.	3rd Bench. (*Group C.*) Mr. Justice F. B. Kemp. Mr. Justice F. A. Glover.	4th Bench. (*Group D.*) Mr. Justice W. S. Seton-Karr. Mr. Justice A. G. Macpherson.	5th Bench. Mr. Justice L. S. Jackson. Mr. Justice C. P. Hobhouse.	Remarks.
Monday ...	Mr. Justice Loch and Mr. Justice Dwarkanath Mitter ... Regular Appeals.	Motions, and afterwards Special Appeals.	Appeals, Revisions, and References in Criminal Trials	Regular Appeals ...	Motions for revisions in Criminal Trials under Section 434 of the Code of Criminal Procedure; Revisions of Criminal Statements of Sessions Judges; or Appeals, Revisions, and References in Criminal Trials.	It is intended that two days at least in every week shall be devoted by each Bench to the hearing of Regular Appeals. If, therefore, a day fixed for the hearing of Regular Appeals before any of the Benches be a holiday, such Bench will take up Regular Appeals on the first day after the holiday, even though it be a day fixed for Special Appeals.
Tuesday ...	Ditto ... Ditto ...	Ditto	Special Appeals ...	Ditto	Revisions of Criminal Statements of Sessions Judges; and if none, Miscellaneous Appeals.	
Wednesday ...	Ditto ... Motions, and afterwards Special Appeals	Regular Appeals	Regular Appeals ...	Special Appeals, and, if necessary, Miscellaneous Appeals, of which previous notice will be given, and a list made out ...	Miscellaneous Appeals.	If, at the rising of a Division Bench, on any day fixed for the hearing of Regular Appeals, a Regular Appeal be only partly heard, the Bench will proceed with that Appeal on the following day or days until it is finished; and if there be not sufficient Regular Appeals on the list of any Division Bench to occupy the whole of any day set apart for Regular Appeals, the Bench will proceed with its list of Special Appeals, and *vice versâ*.
Thursday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals.... Mr. Justice Loch ... English Department.	Ditto...	Special Appeals ...	Motions, and afterwards Special Appeals ...	Ditto.	
Friday ...	The Chief Justice ... Mr. Justice Dwarkanath Mitter ... Regular Appeals. Mr. Justice Loch ... English Department.	Special Appeals	Regular Appeals ...	Ditto	Ditto.	In like manner, if there be not sufficient Appeals, Revisions, and References in Criminal Trials to occupy the time of any Bench on the day fixed for such cases, such Bench will proceed with Special Appeals.
Saturday ...	The Chief Justice ... Mr. Justice Hobhouse... Motions, Small Cause Court References, and afterwards Special Appeals ... Mr. Justice Loch ... Mr. Justice Dwarkanath Mitter ... Special Appeals ...	Ditto...	Special Appeals ...	Appeals, Revisions, and References in Criminal Trials	Mr. Justice Jackson. Miscellaneous Department. Mr. Justice Hobhouse will sit with the Chief Justice.	

NOTE.—The 4th Bench will take Miscellaneous Appeals instead of Special Appeals on Wednesdays only, if the Miscellaneous Appeals cannot be kept under by the 5th Bench.

The 5th Bench will, when practicable, hear the Regular and Special Appeals that may be transferred from any of the other Benches, of which three days' notice will be given, specifying the cases to be transferred for hearing, and the days on which this Bench will sit for the purpose.

Two Courts, one by Mr. Justice Norman, and one by Mr. Justice Markby, will be held for the exercise of the Ordinary Original Civil Jurisdiction, except upon days which shall be fixed for Appeals from the Original Jurisdiction, of which due notice will be given, and upon days occupied with any Criminal Sessions.

At such times, only one Court will sit in the exercise of Ordinary Civil Jurisdiction.

Temporary arrangements will be made as required by each Division Bench for hearing Reviews or Applications for Review of the Judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals.

Reviews and Applications for Review will be heard before both Judges.

Temporary arrangements will also be made for the hearing of Full Bench cases, and also for the hearing of Appeals from the Original Jurisdiction.

The distribution of Regular and Special Appeals will be regulated by the Memo. of Groups of Districts subjoined—those from any District in a group being placed on the list of the Bench indicated, except any appeals from orders on remand, which will be distributed to the Judges who made the order of remand; and if the Judges should not be sitting on the same Bench, then to the Judge who recorded the order of remand.

Group A. (*1st Bench.*)	Group B. (*2nd Bench.*)	Group C. (*3rd Bench.*)	Group D. (*4th Bench.*)
Assam (including Eastern Dooars)	Backergunge	Bhaugulpore	East Burdwan
Beerbhoom	Cuttack	Monghyr	Cooch Behar (including Western Dooars)
Chittagong	Chota Nagpore	Cachar	Dinagepore
Moulmein	Hooghly	Dacca	Cossya and Jyntea Hills
Gyah	Nuddea	Furreedpore	Maldah
Mymensingh	Sarun	Jessore	Moorshedabad
Rungpore	Tipperah	Midnapore	Patna
Bograh	Noakhally	Purneah	Rajshahye
Shahabad		Sylhet	Pubna
		West Burdwan	24-Pergunnahs

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*** The above work will be found invaluable to all persons interested in landed property in Bengal, as also to all Judges, Magistrates, Collectors, Zemindars, and Planters, inasmuch as it is a concise treatise of the working of Act X of 1859, modified to December, 1864.

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THE

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AND

CRIMINAL REPORTER,

A BI-MONTHLY SERIAL,

CONTAINING

THE CIRCULARS OF THE BOARD OF REVENUE, AND ALL DECISIONS ON APPEAL TO THE HIGH COURT IN REVENUE, CIVIL, AND CRIMINAL MATTERS, WITH CIRCULARS AND LETTERS OF THE HIGH COURT, AND OF THE JUDICIAL DEPARTMENT OF THE GOVERNMENT OF BENGAL, PRIVY COUNCIL DECISIONS, SMALL CAUSE COURT AND OTHER REFERENCES, &c., &c., &c.

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PART I.

CIVIL RULINGS.

Appeal under Section XV of the Letters Patent.

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CASE 18 OF 1867.

Oomesh Chunder Goopto, (Plaintiff) *Appellant, versus* Rajnarayun Roy, (Defendant) *Respondent.*

Before *Peacock*, C. J., and *Loch* and *L. S. Jackson*, J. J.

Baboo Anund Chunder Ghosal for Appellant.
Baboo Sree Nauth Dass for Respondent.

Doubtful whether the doctrine of merger applies to Mofussil cases.

Where an under-tenure can be sold for arrears free of encumbrances, the purchaser has a right also to get rid of trespassers upon the tenure while in the hands of the defaulting under-tenant. The purchaser's cause of action arises on the date of his purchase, whether he be the superior taluqdar or a stranger.

Peacock, C. J.—This suit was brought by the plaintiff to recover possession of a piece of ground, which was originally included in an under-tenure granted by plaintiff. The tenure is called in the judgments a putnee tenure, but in strictness it was not a putnee tenure, the talook of the plaintiff not being an estate in respect of which he paid revenue to Government. The under-tenure was put up to sale in execution of a decree of the Revenue Court for an arrear of rent due in respect of it, and the plaintiff himself purchased the under-tenure at that sale. Upon seeking to recover a portion of the land, which is the subject of this suit, from the defendant, the latter set up an adverse possession for upwards of twelve years, and contended that the plaintiff was barred by limitation.

This plea cannot be supported if the plaintiff's right of action accrued when he purchased the under-tenure, and the defendant cannot avail himself of limitation unless the period during which the defendant occupied adversely to the under-tenant can be taken into consideration.

The Moonsiff held that limitation was not a bar, and the Judge upheld his decision, saying that it was unnecessary to consider whether the under-tenure was sold free from incumbrances, or not, inasmuch as when the plaintiff purchased the tenure it merged in his larger interest.

Upon appeal to this Court, Mr. Justice Bayley, who was the senior Judge, held that the suit was barred by limitation; the other Judge, Mr. Justice Phear, considered that the decision of the Lower Courts was correct, and that the plaintiff was not barred. This opinion was also founded upon the doctrine of merger, and he did not enter into the question whether the under-tenure was sold free from incumbrances.

My own impression is that the doctrine of merger does not apply to lands in the Mofussil in this country. If it applies, the under-tenure would have

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merged, even if the plaintiff had purchased from the original holder of it; so it would have merged if the plaintiff had purchased subject to incumbrances created by the under-tenant; but it is clear that in either of the cases above supposed, the purchase would not have freed the under-tenure from all incumbrances created by the under-tenant. If the under-tenure had been clearly bought subject to incumbrances created out of it, it does not appear to me to be at all clear that the plaintiff would have had any remedy to recover the rents due under any tenure created out of such under-tenure; if the under-tenure itself were merged in the original tenure out of which it was created, the consequence would be that the plaintiff would be bound by a tenure created out of the under-tenure, without having any remedy to recover the rent under such tenure. I believe it is the practice in this country for zemindars to purchase and keep on foot putnee talooks without the necessity of adopting the practice which is followed in England, of purchasing such talooks in the name of a trustee to prevent the merger of them. If the doctrine of merger applies, a zemindar could not purchase and hold a putnee tenure in khas possession.

The Judge, in support of this view, cited a case which was decided by the late Sudder Court in 1856. I do not find that case reported, and I understand that there are rulings to the contrary. If it were necessary to determine the question upon the point of merger, it would, I think, be well to refer the case to a Full Bench to determine the question. It appears to me, however, that, without reference to the doctrine of merger, the plaintiff is not barred by limitation.

It is said that the sale took place under Section 105 of Act X of 1859, which enacts that if a decree be for an arrear of rent due in respect of an under-tenure which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale according to the rules for the sale of under-tenures, for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force.

It is said that Section 15 of Regulation VII of 1799, having been repealed by Act X of 1859, was not in force at the time when the sale of the under-tenure took place in this case, and that there is, therefore, no law under the provisions of which the sale was free from incumbrances.

In the Full Bench case, which has been referred to from the 5th Wyman's Reporter, Part II, page 13, it was held that a sale for arrears of rent under Section 105 of Act X of 1859 is not free from incumbrances created by the defaulter before the sale, unless the right of selling, or bringing to sale, the tenure for an arrear of rent has been specially reserved by stipulation in the engagements interchanged in the creation of the tenure.

In this case there was a stipulation in the grant of the under-tenure, that if the tenant should not pay the rent reserved voluntarily, the grantor might realize the same by putting in force the provisions of Regulation VIII of 1819. That was a stipulation which brings this case within the exception mentioned in the Full Bench case to which I have adverted.

It has been pointed out that Section 15 of Regulation VII of 1799, upon which the Court relied in the Full Bench case, has been repealed by Act X of 1859, and, therefore, I will consider the case without adverting to the Full Bench case, in order that we may see how it stands.

Regulation VIII of 1819 applies to putnee talooks, and not to under-tenures such as that which is the subject of decision in this action; but I think the fair and reasonable interpretation of the stipulation, that the grantor might realize his rent by puting in force the provisions of Regulation VIII of 1819, is, that the grantor should be at liberty to exercise for the enforcement of the payment of rent under the under-tenure, the same provisions as, by Regulation VIII of 1819, are applicable to putnee tenures, and that the stipulation, in substance, amounted to an agreement that the grantor should be at liberty to sell the under-tenure free from all incumbrances.

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Now, it has been held by the late Sudder Court, in the Decisions for 1850, page 349, that the purchaser of a tenure sold free from incumbrances is not barred by limitation from turning out a trespasser, although he may have had adverse possession for more than twelve years before the sale of the tenure; and it appears to me to be only reasonable and just that the cause of action to a purchaser of an estate free from incumbrances against the person who has trespassed, or the defaulter, should be deemed to have accrued at the same time as his right to turn out under-tenants of the defaulter, *viz.*, from the time of the purchase of the tenure of the defaulter.

It is contended that as the defendant was a mere trespasser, he was not bound, as grantees of the defaulter would have been, by the stipulation that the grantor might sell free from incumbrances. But suppose the stipulation had been that the grantor should be at liberty to re-enter and avoid the under-tenure altogether, I apprehend that a trespasser upon the defaulter would be so far bound by that agreement, that the grantor, upon avoiding the lease, would acquire a right of action to turn out the trespasser.

If, during the existence of the under-tenure, the under-tenant allowed the trespasser to encroach upon the lands included in the under-tenure, and to hold adversely for upwards of twelve years, during the existence of the under-tenure, the grantor of the under-tenure, upon default of the payment of rent, would be at liberty, under Section 112 of Act X of 1859, to distrain the crops growing upon the land which had been encroached upon, notwithstanding the trespasser might have held adverse possession for more than twelve years as against the defaulter. That is, merely upon the ground that the land held by the trespasser, notwithstanding the encroachment and the Statute of Limitations, still remains part of the under-tenure.

Section 11 of Regulation VIII of 1819 says that no trespass by sale, gift, or otherwise shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure.

When a putnee is sold by a zemindar, under Regulation VIII of 1819, for arrears of rent, it is sold in the estate in which it was created, and the purchaser is entitled to have it in the estate in which it was created, notwithstanding any under-tenures which may have been created by the defaulter, and notwithstanding any encroachments by trespassers upon the holders of such under-tenures. He has a right to turn out under-tenants, and he is entitled to turn out persons who have encroached upon the defaulter.

If the defendant in this case had encroached upon the defaulter only a year before the sale, the purchaser would have had a right to turn him out. That is not disputed; but it is said that the purchaser cannot turn out the trespasser now, because he is barred by limitation; or, in other words, because he did not bring his action within twelve years from the time at which his cause of action accrued.

It appears to me that the cause of action of a purchaser of a tenure sold free from incumbrances under a sale for arrears of rent due in respect of it, accrues when he purchases it, and not before.

If the grantor is entitled to make the under-tenure answerable for arrears of rent in the state in which he created it, and to sell it for that purpose free from incumbrances, the purchaser's right to have it in the state in which it was created, accrues when he purchases it.

Mr. Justice Bayley thinks that the plaintiff's cause of action accrued when the trespass was committed upon his tenant; and he says that he might have sued, notwithstanding the tenure, to have it declared that the land upon which the trespass had been committed was part of the estate included in the tenure.

Assuming that he could have brought such an action, it would have been merely for a declaration of right, and not for relief; a very different cause of action from that which he has instituted to recover possession. The difficulties and dangers of zemindars would be great if they were bound to sue for de-

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clarations of right, whenever they should discover any person other than the tenant in possession of any part of the land included in a putnee tenure. They would have no means of knowing, and no means, that I am aware of, of compelling either the tenant or the trespasser to inform them whether the person in occupation was there with the consent of the holder of the tenure or an under-tenure derived from him, or merely as a trespasser. To hold that a grantor is bound to sue immediately a trespass is committed upon his tenant, and that he will be bound by limitation if he does not sue within twelve years from the time that the trespass was first committed, would open such a door to fraud and collusion between tenants and trespassers, that the zemindar or land-owner, when he seeks to inforce the payment of his rent, would often find trespassers whom, in consequence of limitation, he could not get rid of in possession of the greater portion of the tenure, and who, as soon as he should have defeated the landowner by the plea of limitation, would probably share the spoil with the defaulting tenant. Instead of granting under-tenures, tenants would allow their friends and relations to trespass upon their tenures, and thus protect them by limitation in the event of default in payment of their rent. But even if the grantor could, during the existence of the under-tenure, have maintained such an action against a trespasser upon his under-tenant, it is clear that a purchaser of an under-tenure could not do so before the sale; and if not, how could the grantor of an under-tenure sell the under-tenure in the state in which he created it, if the purchaser is to be barred by limitation against persons who have encroached upon the under-tenant?

In this case, the purchaser and the talookdar are one and the same person, but, as in his capacity of talookdar, he appears to me to have no greater right by the doctrine of merger than any other purchaser would have had. He is not precluded by the merger of purchaser and talookdar in the same person, from exercising the same rights as any other purchaser would be entitled to do. I am of opinion that his cause of action in this case as purchaser accrued when his purchase was made, and not at the time when, as talookdar, his cause of action arose to sue for a declaration of right, to prevent a confusion of boundaries upon the termination of the tenure.

If the doctrine of merger did apply, the plaintiff is clearly not barred by limitation. If it did not apply, it is equally clear that he is not barred. Though Mr. Justice Phear determined this case upon the ground of merger, I entirely agree with the following remarks which were made by him, merely substituting the word "under-tenure" for "putnee" used by him, as the under-tenure was not in reality a putnee. He says:—"I am, however, inclined to think that the decision itself is right. It seems to me that, during the pendency of the under-tenure, the plaintiff was not entitled to the possession of the land, subject to the under-tenure, even as against a trespasser; he was only entitled to such rents, profits, and privileges as were reserved to him by the pottah, and the reversion of the property contingent on the event of the under-tenure in any way coming to an end. If this view be correct, the occurrence of the encroachment did not give him any right to sue to recover possession * * * and as long as the under-tenure continued in being, his possession relative to the wrong-doer did not alter. Consequently, the cause of action upon which the plaintiff now sues did not accrue *to himself* during the time that the under-tenure lasted."

For these reasons, it appears to me that the judgment of the Divisional Bench, pronounced in accordance with the views of Mr. Justice Bayley, as senior Judge, ought to be reversed with costs, and the judgment of the Zillah Judge affirmed with costs of this appeal.

Loch, J.—I have nothing to add to the remarks which have fallen from the Chief Justice, and I concur in the judgment delivered by him.

Jackson, J.—I am also of the same opinion as the Chief Justice.

It is perhaps scarcely necessary, after the very full judgment which he has just delivered, and which appears to exhaust the entire case, that I should add anything to what he has said; but as the conclusions at which I have

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arrived on one or two points, although identical with what the Chief Justice has stated, have been arrived at on somewhat different grounds, I think it right, as well as respectful to the learned Judge, whose judgment we are overruling, that I should shortly state my views on these points.

I most fully concur in all that has fallen from the Chief Justice in respect of the doctrine of merger. I am not aware of any solid foundation for the opinion that that doctrine is any part of our Mofussil law. It is necessary, therefore, to consider this case upon points other than the applicability of that doctrine, upon which both the Zillah Judge and Mr. Justice Phear have mainly rested their judgment.

It seems to me quite clear that plaintiff's right to succeed in this suit must depend entirely upon the power of the landowner to sell the under-tenure which he had created free from all incumbrances which had arisen since its creation. I observe that the special appeal in this case raised no objection to the sale under which the tenure passed, and under which all those incumbrances are assumed to have been extinguished. I am not prepared to say that if this question had been raised, the case would have been entirely free from difficulty to my mind; for since the repeal, by Act X of 1859, of the first 20 Sections of Regulation VII of 1799, it is not perfectly clear under what provisions of the general law sales are made of under-tenures. But no question of this sort having, as I have stated, been raised in special appeal, I think we are entitled to assume that a valid sale took place, and was made by the proper authority.

I see, moreover, that in the contract between the landlord and lessee, provision was made for such sale, and the consequent falling in of all incumbrances which the lessee might have created. The condition in the contract provided that, in the event of the lessee failing to make the payments voluntarily, the provisions of Regulation VIII of 1819 should be put in force.

I observe that plaintiff, in commencing his suit, described himself as "the zemindar," and it seems quite possible that, in drawing up the lease and the kobooleut between him and the lessee, he may have been looked upon as zemindar; and thus the express provisions of Section 8 and the following Sections of Regulation VIII of 1819 may have been looked upon as applicable to the case.

Assuming, then, that the sale was duly held, and seeing that the contract provided for the sale free from all incumbrances, it seems clear that the purchaser under such sale was entitled to proceed, immediately on his purchase, to get rid of the defendant whom he found in the character of a trespasser upon his land; and it seems difficult to understand how the Law of Limitation could apply. I do not quite understand how Mr. Justice Bayley would apply that law. He does not agree with Mr. Justice Phear as to the applicability of the doctrine of merger. To me it seems clear that plaintiff brought his suit, not as landowner, but as purchaser of the under-tenure, and if he sued as purchaser, is he to be told that he is barred, because the zemindar might have brought a declaratory suit years before? He cannot as purchaser be barred by reason of the failure of the zemindar to bring a suit of that description.

But was the zemindar bound to bring such a suit? I most fully concur in all that has fallen from the Chief Justice on that point. Assuming that the zemindar might have brought such a suit, it would be one of a most dangerous character, and zemindars bringing such suits would be under the perpetual risk of having to pay the defendant's costs, if it were found that the defendant occupied the land, not as a trespasser, but with the consent of the tenant.

But I may add a further consideration on this subject. If the zemindar were to let lands to a putneedar, the putneedar to a dur-putneedar, and the dur-putneedar to a se-putneedar, and a trespasser encroached on the lands when in the occupation of the se-putneedar, are the putneedar, dur-putneedar, and se-putneedar all bound to bring a declaratory suit, or which of them is bound to bring such suit? It appears to me altogether unreasonable

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to expect landowners, when they have let lands to responsible tenants, to be perpetually on their guard as to the encroachments of trespassers; or, when leases have fallen in on account of the default of lessees, to tell a purchaser in a suit brought by him against the trespasser, that he is barred by limitation if the trespasser had held adverse possession for more than twelve years against the defaulter.

I have thought it right to state these considerations which have independently occurred to me; but with the very trivial exception as to the doubt in my mind with regard to the sales, I desire to say that I concur in the decision of the Chief Justice; and for the reasons which he has given, as well as for those which I have stated, I think that the judgment of the Divisional Bench should be set aside with costs.

CASE 470 OF 1867.

3rd June.

Miscellaneous Appeal from Rajshahye.

Khema Debia and others, (Decree-holders) *Appellants, versus* Kumlakant Buskshee and others, (Judgment-debtors) *Respondents.*

Before *Bayley* and *Markby*, J. J.

Baboo Issur Chunder Chuckerbutty for Appellants.
No one for Respondents.

A decree given in suit for contribution declaring the liabilities of each of several co-sharers, is not kept alive against all by execution proceedings taken against one sharer.

The appellants in this case are seeking to execute a decree, dated 21st March, 1863, which declares that certain of the defendants in the suit, being six in number, should pay to the plaintiff Rupees 749-0-9; that certain others of the defendants, being five in number, should pay to the plaintiff Rupees 91-8-2; that certain others of the defendants, being three in number, should pay to the plaintiff Rupees 60-8-6; and that the remainder of the defendants, being seven in number, should pay the sum of Rupees 280-0-9, in all Rupees 1,181-5-0, which, with costs in proportion, the defendants were to pay *according to their respective shares.*

The suit was brought by one of several persons jointly interested in land against his co-sharers; the ground of his action being that he had been compelled to pay the whole Government revenue due in respect of the land, and he now sought to recover from his co-sharers that which he had paid in excess of his own proper share. The result of the suit was that he got a decree in his favor in the form stated above.

The obligation of the co-sharers in some way or other to satisfy this demand is well-known, though there has been occasionally some difficulty and some misunderstanding as to the exact nature of the obligation, the mode in which it arises, and the mode in which it is to be enforced.

The mode in which the obligation arises is no longer of any importance, as soon as it is ascertained what the obligation is, and the mode in which it is to be enforced; and both these points have, we consider, been finally settled by the practice and decisions of this Court in the following manner:—

1. That each co-sharer is bound to refund to the one who has paid the whole revenue so much as he ought himself to have paid.

2. That this obligation is to be enforced by a suit against all the co-sharers, in which the amount of their several liabilities is to be declared by the Court.

It can perhaps hardly yet be said to be fully ascertained how the rights of the parties are to be adjusted, if one of the co-sharers should be unable to fulfil his obligation, but no such question arose in the case before us. The above two propositions were recognized in the Full Bench decision reported in the III Wyman's Reporter, Part V, page 23.

Now, turning to the case before us, we find that, in the year 1863, the plaintiff attached the property of one of the six defendants who were ordered to pay Rupees 280-0-9. On the 27th November, the defendant whose property

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had been attached deposited in Court the sum of Rupees 368-0-4-2, being the above amount, together with the share of costs of this set of defendants, and interest; and upon his doing this, the execution case was struck off the file, by which we understand it to be meant that the attachment was taken off, and the execution proceedings entirely put an end to. From that time no further proceeding were taken by the plaintiff, until the 21st November, 1866, when he made an application for the purpose of taking out execution against that batch of defendants who were ordered to pay Rupees 749 0-9. It was thereupon objected that execution of the decree was barred under Section 20 of Act XIV of 1859. The plaintiff, in answer, relied on the proceedings taken against the former batch of defendants, the last step in which was taken on the 27th November, 1866. The Principal Sudder Ameen, however, to whom the application was made, gave his opinion in a very clear judgment, that the decree was not a joint one against all the defendants, but a separate one against each batch; and that the proceedings against one batch had no effect whatever towards keeping alive the separate decrees against other batches; and he held the execution to be barred by limitation under the provision referred to.

Upon appeal, the Judge of Rajshahye confirmed this decision

It now comes before us as a miscellaneous appeal, and we also think the Principal Sudder Ameen was right.

It appears to us that the language of the decree is clear; it directs each batch of defendants to pay a certain sum of money, and there is not a single word in the decree which would lead us to suppose that it was the intention of the Court which passed the decree to impose a joint liability upon all the defendants for the whole amount.

It is said that the decree must be considered as creating a joint liability, because the plaintiff has a right to hold all the defendants jointly liable for the amount which he has paid in excess of his share; but, as appears from what has been already stated, this argument is directly opposed to the established law and practice of this country. In such a suit as this, though all the sharers must be sued together, yet it is the business of the Court by its decree to apportion the liability amongst the shareholders according to their respective shares, and not to give a joint decree against all. This was done, as far as it was necessary to do so, in the present case.

We have been much pressed with a case decided by Justices L. S. Jackson and Hobhouse, reported in IV Wyman's Reporter, 47. There is, no doubt, great similarity between that case and the present, and had we differed from those two Judges on any principles of law, we might have thought it right to send the case before a Full Bench. But we do not consider that, upon any principles of law involved in this case, there is any difference of opinion whatever. The Judges, in that case, thought that the decree before them was joint and several, and considered that the joint liability of all the defendants was kept alive by proceedings against any single one. We do not question this, but, in our opinion, the decree before us is *not a joint decree* as against all the defendants; it, in fact, comprises four decrees against four separate batches of defendants, and though, as between defendants comprised in the same batch, there is a joint liability for the amount which that batch has to pay, yet, as between the members of different batches, there is no common liability. Consequently, we consider that the proceedings in execution against one batch of defendants would not have any effect in keeping the rights of the decree-holder alive as against defendants who belonged to other batches; and no proceedings having been taken within three years to execute the decree against the batches of defendants to which the respondent belongs, the rights of the decree-holder under this decree is, as against these defendants, barred by limitation.

The appeal is dismissed with costs.

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10th June.
CIVIL JURISDICTION.

CASE 2704 OF 1867.

Special Appeal from Nowgong.

Okhrah Soot, (Defendant) *Appellant, versus* Bheden Boriance, (Plaintiff) *Respondent.*

Before *Kemp* and *E. Jackson*, J. J.

Baboos Khetter Mohun Bose and *Shoshee Bhoosun Bose* for Appellant.
Baboo Chunder Madhub Ghose for Respondent.

Difference of opinion as to whether, under Section 2, Act XV of 1856, a Hindoo widow re-marrying ceases absolutely to have any rights of inheritance, or the power of acquiring such, in her first husband's property; or whether she only forfeits such rights as may have actually accrued to her at the date of her re-marriage.

Kemp, J.—The defendant is the special appellant.

It is stated in the plaint that one Peokam died leaving a widow, the plaintiff, a son, Burut Ram, and a daughter, Dhum Mala, him surviving. The defendant is the step-brother of Peokam.

The plaintiff re-married, and she now sues in right of inheritance claiming the estate of her son Burut Ram, which became vested in him on the death of his father Peokam.

The lower Courts have given the plaintiff a decree.

In special appeal it is contended—

1*st.*—That the Court of first instance was wrong in allowing such an amendment of the plaint as changed the very nature of the suit.

2*nd.*—That the lower Courts have erred in declaring that the plaintiff is entitled to succeed to the estate of her son Burut Ram, inasmuch as, under the provisions of Section 2, Act XV of 1856, all her rights and interests in that estate ceased and determined upon her re-marriage.

I am of opinion that the lower Courts were not wrong in arraying the plaintiff amongst the parties to the suit under Section 77, Act VIII of 1859. The plaintiff first sued as guardian of her daughter, a minor, but finding that she had a personal right in the estate claimed, and that she was likely to be affected by the result of the suit, she applied to be made a co-plaintiff, and her application was complied with. The character of the suit was not changed, and as the objection is, at the best, a technical one, and the order admitting her to be made a party to the suit does not affect the merits of the case, or the jurisdiction of the Court, I would reject it under the provisions of Section 350, Act VIII of 1859.

On the second point, which is a novel one, I am of opinion that the decision of the Court below is right.

At the time of the re-marriage of the plaintiff, her son Burut Ram was alive, and the estate of the former husband of the plaintiff was vested in the said Burut Ram. Section 2, Act XV of 1856, runs thus:—"All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without any express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

At the time of her re-marriage, no rights and interests, either in the estate of her deceased husband, or in the estate of his lineal successor, the son, had become vested in the plaintiff; therefore, no estate in which she had any rights and interests ceased and determined upon her re-marriage. After the re-marriage, the son died, and the estate which he inherited from his father devolved on the plaintiff; and under Section 5 of the same Act, *viz.*, XV of 1856, she does not, by reason of her re-marriage, forfeit her right thereto.

I would dismiss this special appeal with costs and interest.

Under Section 15 of the Letters Patent, dated 28th December, 1865, the appeal will be dismissed with costs and interest.

Jackson, J.—I agree with Mr. Justice Kemp on the first point argued.

I would not now reverse the decision of the lower Court on the ground

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of the amendment allowed in the plaint. Whether that was strictly legal or not, it is not a point affecting the merits of the case. But I differ from my learned colleague in the interpretation which he puts upon Act XV of 1856, and more especially upon Section 2 of that Act. I do so with some hesitation, as the words of the Section are somewhat ambiguous. "All rights and interests which any widow may have in her deceased husband's property by inheritance to her husband, or to his lineal successors, shall, upon her re-marriage, cease and determine as if she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

The plaintiff in this case is a widow, and has re-married. At the date of her re-marriage, her deceased husband's property had been inherited by his son. The son has since died, and the plaintiff now claims to succeed to her son's estate. The right which she now claims is a right in her deceased husband's property by inheritance to his lineal successors. But it is said that the widow had no such right at the time of her re-marriage, and such right did not, therefore, cease and determine; that the law, in fact, alludes only to such property as the widow had inherited before her re-marriage. I think that the words of the Act bear a more extended signification, and that "upon her re-marriage" should not be read as at the date of such re-marriage, but with reference to such re-marriage. All rights which the widow has in her deceased husband's property by inheritance to him and to his lineal successors cease by reason of her re-marriage, and in consequence of her re marriage as if she had then died, and thereupon, that is, when her right has ceased, the next heir shall inherit. The policy of the law appears to me to be one which is generally acknowledged in all society, and which is, perhaps, more especially required to be put in force in Hindoo society, *viz.*, that the widow by re-marriage shall not take her late husband's property away from his family and into the hands of her new husband. Take the case of a joint Hindoo family of six brothers: one of them dies leaving a minor son and a widow. The minor son takes his father's property. His mother re-marries, and if the minor son dies before attaining majority, he cannot make a will, and the result will be, if she can inherit the property, that the widow, being re-married, takes a share with the joint brothers of her first husband's property, and is entitled to a share in the family house and everything that the family possesses, and to enjoy this, she will have a right to bring her new husband into the family.

The policy of the law seems to me to be to prevent any further interference by the widow after her re-marriage in her deceased husband's property, or, as stated in the abstract of this Section given at the head of the law, that the rights of the widow in her deceased husband's property are to cease on her re-marriage. Upon her re-marriage, she is to be dead to all rights of inheritance to her deceased husband's property, not only dead at that moment to such rights as she has inherited, but dead then, and for the future, to all such rights. Section 3 of the Act supports this view. The family of her deceased husband can, by petition to the Court, deprive the widow of even the guardianship of her children on her re-marriage. Section 5 of the Act seems to me to refer more especially to her new husband's property. It would include also all property left by will, or as heir, to any one except her new husband and his lineal successors, but the widow cannot, under the Hindoo law, inherit from any one except the husband or his lineal successors.

I would reverse the Judge's decision, and dismiss the plaintiff's suit with all costs.

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CASE 2287 OF 1867.

Special Appeal from Sylhet.

Kishen Chunder Dass and others, (Plaintiffs) *Appellants*, *versus* Mahomed Afzul, *alias* Mahomed Mirza, and others, (Defendants) *Respondents*.

Before *L. Jackson* and *Dwarknauth Mitter*, J.J.

Baboos Gopal Lall Mitter and *Chunder Madhub Ghose* for Appellants.
Baboos Jugodanund Mookerjee, *Sreenauth Dass*, and *Debendro Narain Bose* for Respondents.

An order of the superior Survey and Revenue Authorities declining summarily to go into the merits of an appeal is the final order in the case, from which limitation for Civil suit runs.

The question raised before us is whether, in a case of award by a Survey Deputy Collector, and confirmed by the Superintendent of Survey, an appeal having been made successively to the Commissioner of Revenue, both of whom declined to go into the merits of the case, whether, under such circumstances, the three years within which a suit may be brought to get rid of the award, is to be calculated from the date of the Survey Officer's award, or that of the final decision. The Judge has held that because the Commissioner and the Board of Revenue had summarily thrown out the appeal, the only real award was that made by the Survey Officer, and that the plaintiff was therefore bound to sue within three years from the date of that award. On this point, the special respondent has not addressed any arguments to the Court, and has left the question in our hands. We think that there can be no doubt about it. This being a suit brought for the purpose of contesting the justice of an award made by the Survey Authorities, and also for the purpose of obtaining a declaration of the title of the party concerned, the period of limitation is to run* for three years from date of the final award or order in the case. There can be no doubt whatever that the final order is that of the Board of Revenue. The law admits an appeal successively from the award of a Survey Officer to his immediate superiors, and to the Commissioner and the Board of Revenue; and the fact that the Board summarily dismissed the appeal without entering into the merits of the case, does not make it the less a final order. In our opinion, then, the suit being brought within three years from the date of that order, was within time.

* Clause 6, Section 1, Act XIV of 1859.

The second question raised by the special respondent, *viz.*, whether, as the award of the Survey Officer had not been executed, and the plaintiff was in possession of the property, that portion of the plaintiff's suit which seeks for the removal of that award might not be treated as surplusage. Upon that point, the question arises, whether, in such circumstances, a sufficient cause of action is disclosed. This point is not for us to decide. The sole question before us is whether the decision of the lower Court on the point of limitation is right or not. All the other questions arising out of this suit must be determined by the Court below.

CASE 150 OF 1868.

12th June.

Miscellaneous Appeal from Sylhet.

Syud Ahsan Ally, (Judgment-Debtor) *Appellant*, *versus* Sabokee Bibee, (Decree-holder) *Respondent*.

Before *Loch* and *Glover*, J. J.

Baboos Gopal Lall Mitter and *Greesh Chunder Ghose* for Appellant.
Moulvie Syud Murhumut Hossein for Respondent.

A right of pre-emption declared and decreed by a Court is not forfeited by failure to pay the purchase-money within a time fixed (*ultra vires*) by the Court.

In this case, one Sabokee Bibee got a decree affirming her right of pre-emption to certain lands in possession of the defendant.

The words of the decree were that the decree-holder should be entitled to take possession of the lands on paying Rupees 200, either within two months of the date of the decree, or within one month after the judgment on appeal, should the case be appealed.

The case was appealed, and again decided in her favor; and one month and 8 days after that decision she tendered the 200 Rupees, and took out execution of her decree.

She was opposed by the judgment-debtor, on the ground that she had not tendered the purchase-money within the time specified in the decree.

Both lower Courts decided in favor of the decree-holder, and the judgment-debtor now appeals specially on the same ground as that taken below.

We think that the judgment was right. A right of pre-emption once established and decreed cannot be annulled by non-payment of the purchase-money within a time specified by the Court making the decree. That Court had no jurisdiction to make such an order, or to annul the rule of Mahomedan law by adding to it a proviso which might have been incapable of execution.

It is not incumbent on a pre-emptor to produce the price at the time of making his claim; and even after the decree has been pronounced, if he should delay to deliver the price after he has been directed to deliver it, his right is not cancelled, and this, without any difference of opinion. (*Vide* Baillie's Mahomedan Law, Chapter IV, page 489).

It appears to us, therefore, that the decree-holder was able to enforce her claim at any time within the period allowed by law for the execution of decrees.

The special appeal is therefore dismissed with costs.

Special Appeal from Gya.

CASE 2573 OF 1868.

18*th June.*

Greeja Singh (Plaintiff) *Appellant*, *versus* Girdharee Singh and others, (Defendants) *Respondents.*

Before *Bayley* and *Macpherson*, J. J.

Baboo Khetternath Bose for Appellant,
Baboo Nil Madhub Sein for Respondents.

Registration of deeds executed before Act XX of 1866 is not compulsory, and such unregistered deeds are not overridden by subsequent registered deeds.

Macpherson, J.—The plaintiff (who is the appellant before us) sued for possession of certain lands which he claimed under a kobalah, or bill of sale, dated the 29th October 1866, and duly registered in accordance with the provisions of Act XX of 1866. The defendants plead that the land belongs to them, and that they purchased it from the person through whom the plaintiff's vendors make their title, in Bysack, 1262, (that is to say in 1855,) and have been in possession ever since. The defendants' kobalah is dated the 2nd Bysack, 1262, but is not registered.

The lower Appellate Court has decided in favour of the defendants, finding that the property was really sold to them as alleged; that they paid full consideration for it; and that they were at once put in possession, and have been in possession ever since.

In appeal, it is contended that the lower Appellate Court has erred in not giving the preference to the plaintiff's kobalah, it having been duly registered, while the other is not registered at all.

Section 100 of Act XX of 1866 enacts that every instrument of the kinds mentioned in Sections 17 and 18, which shall have been executed in any part of British India before the Act came into operation therein, shall be accepted if it be duly presented for registration within 12 months from such date. The defendants' kobalah, therefore, might have been registered under Act XX of 1866, if it had been presented for registration within twelve months after the Act came into force in Gya. Section 50 of Act XX says that every instrument of the kinds mentioned in clauses 1, 2, and 3 of Section 18 shall, if duly registered, take effect as regards the property comprised therein against every unregistered instrument relating to the same property. It is contended that as the defendants' kobalah is an instrument of the kind mentioned in clauses 1 and 2 of Section 18; and as it has not been registered as it might under Section 100 have been, the plaintiffs' duly registered instrument takes effect as against it.

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It appears to me that, whatever might be the position of the parties, if it were a mere question as to which deed was to be given effect to, the plaintiff is not entitled to recover in the present instance. The defendants' kobalah was duly executed, and, according to the law then in force, it was in no degree essential that it should be registered; the purchase money was paid in full, and possession was then given, and has ever since been held under it. The transfer of the property to the defendants was complete, and nothing was wanting to perfect it according to the law then in force. When it is found as a fact that the *bonâ fide* purchase has been followed by eleven years' possession, the position of the purchaser is far stronger than if he were seeking possession for the first time under his deed of sale, and the question is not merely one as to the effect to be given to the deed as against a deed of later date registered under Act XX of 1866.

I do not think that Section 50 of Act XX of 1866 is to be construed as vitiating all title acquired prior to the passing of that Act, unless the instruments on which they rest are registered under Section 100. Had such been the intention, registration of old deeds would have been made compulsory, and it would have been declared expressly that unless registered, instruments registered under Act XX of 1866 should take effect before them. I think that Section 50 must be read as applying to instruments the registration of which is optional under Section 18, but not as applying to instruments registered under Section 100.

I think, therefore, that this appeal ought to be dismissed with costs.

Bayley, J.—I concur in the above judgment, and the reasons for it. The transaction took place under the old law, and I do not think the deeds then executed can be set aside if *bonâ fide* in every way and supported by long possession as this is.

I also would dismiss this special appeal.

PART II.

RULINGS IN RENT SUITS.

Special Appeal from Beerbhoom.

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CASE 3245 OF 1867.

Kartick Chunder Mookerjee, (Defendant) *Appellant, versus* Mooktaram Sircar, (Plaintiff) *Respondent.*

Before *Peacock*, C. J., and *Dwarka Nath Mitter*, J. J.

Baboos Opendra Chunder Bose and *Bhowanee Churn Dutt* for Appellant.
No one for Respondent.

An order of Deputy Collector in proceedings relating to attachment before judgment cannot be interfered with on appeal.

The suit was brought by the landlord against his ryot for rent, and in that rent suit he attached certain growing crops, under Section 16 of Act VI of 1862, of the Bengal Council. By that Section, Sections 81 to 90, both inclusive, of Act VIII of 1859 were extended to all suits under Act X of 1859. The attachment was an attachment before judgment, and therefore, according to Section 86 of Act VIII of 1859, which is one of the extended Sections, the claim of the intervenor, the present appellant, to the crops ought to have been investigated in the same manner as a claim to property attached in execution of a decree.

The course to be adopted in such a case is pointed out in Section 246 of Act VIII of 1859, and although that Section is not by express words extended to suits brought under Act X of 1859, it is virtually extended to such suits, because it is incorporated with Section 86, which is one of the extended Sections. It is unnecessary to refer to the course pointed out by Section 246. It is sufficient to state that it is expressly declared that an order passed under that Section shall not be subject to appeal, but that the party against whom the order is made is at liberty to bring a suit to establish his right. The order of the Deputy Collector, that the claimant's crops were to be released, was therefore not appealable to the Judge, whereas the Judge has reversed, the whole of the judgment, including that order.

Neither the ryot nor the plaintiff has appealed, nor has the plaintiff appeared in answer to this appeal. It is unnecessary, therefore, for us to interfere with the order of the Judge, so far as it relates to the suit for rent between the plaintiff and the ryot, which will not affect the claimant or any lands belonging to him. All that we have to do is to reverse the Judge's decision so far as it relates to the order of the Deputy Collector, with reference to the crops which had been attached. We therefore reverse the decree of the Judge to that extent with the costs of this appeal, and the claimant's costs in the Judge's Court. The effect of this order of the Deputy Collector, releasing the crops, is to stand as if the Judge had not interfered with it; but having reversed the order of the Judge to the extent above pointed out, we must order that the claimant is to be restored to all that he has lost by reason of that part of the order of the Judge which we reversed. If the crops still remain under attachment, they will be restored to the claimant. If they have been made available in execution of the plaintiff's decree, he must refund to the claimant the value thereof, to be assessed, if necessary, by the Deputy Collector in executing this order of restitution.

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CASES 2588 TO 2594 OF 1867.

Special Appeal from 24-Pergunahs.

Shoudaminee Dossee, (Plaintiff) *Appellant*, *versus* Ram Chand Baido and others, (Defendants), and others, (Intervenors) *Respondents*.

Before *Phear* and *Hobhouse*, J.J.

Baboos Onookool Chunder Mookerjee, *Khetturnauth Bose*, and *Anund Chunder Ghosal* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Bhowanee Churn Dutt* for Respondents.

There is no appeal to the Judge where the Collector in a suit for less than 100 Rupees does not determine, or affect to determine questions of title between the plaintiff and intervenor, although he may have based a collateral argument on title.

The advocates for the different parties in special appeals Nos. 2588 to 2594, both numbers inclusive, admit that all these cases will be governed by one and the same judgment of this Bench. The decision of the first Court, in reference to them, is, among our papers, attached to No. 2591, and it commences in these words:—"The plaintiff in this case sues for arrears of rent. The defendant admits tenancy, but pleads that he has paid his rents to the intervenor, who has come into possession of the tenure by purchase. The intervenor opposes the claim of the plaintiff, on the ground that he is in the receipt and enjoyment of the rent from the defendant. The points at issue are, first, has the intervenor been in receipt of the rent as required by the Act; and, secondly, isthe defendant's rent in arrears. The intervenor comes in under Section 77 of the Act. He cannot show that he has actually and in good faith received and enjoyed the rent before, and up to, the time of the institution of the suit." The Deputy Collector goes on to discuss the evidence produced before him in the case, and shows that the conclusion to which the last words quoted by us indicate that he had come, is supported by that evidence, and eventually he gives the plaintiff a decree as against the intervenor. The intervenor preferred an appeal to the Judge, and the Judge reversed the decision of the Court below as between the plaintiff and intervenor. Against the decision of the Judge, the plaintiff now appeals to this Court specially.

It seems to us that the lower Appellate Court had no jurisdiction in the case to entertain the appeal of the intervenor, and that, consequently, we have now no jurisdiction to entertain these appeals from the decision of the Judge. From so much as we have quoted of the judgment of the Deputy Collector, it is clear that he had in his mind the real question that he was called upon to try between the plaintiff and the intervenor under the terms of Section 77, Act X of 1859, and he expressed his determination of that question strictly in the words of the Section itself. It is true that, in guiding himself to a conclusion upon that question, he did take into consideration matters of title which were put forward by the intervenor. He thought that, as a matter of fact, a small portion of the rent had been actually received by the intervenor just immediately preceding the institution of the suit, but from the conclusion which he drew from the evidence with regard to the nature of the title put forward by the intervenor, as the ground upon which he had obtained these arrears of rent from the ryot defendant, he arrived at the conviction that the receipt of rent actually proved was not a *bonâ fide* receipt of rent within the meaning of the provisions of Section 77, Act X of 1859; and having arrived at that conviction purely as a matter of fact, he decided the issue of fact, which arises by reason of the terms of Section 77 between the plaintiff and the intervenor, against the intervenor.

It is said by the special respondent now that the circumstance of the Deputy Collector having gone into the matter of the intervenor's title at all, shows that the case falls within the exception of the latter portion of Section 153. Now, Section 153 says:—"In suits under Clauses 2, 4, and 7 of Section 23, and under Section 24 of this Act, tried and decided by a Collector, if the amount sued for, or the value of the property claimed, does not exceed 100 Rupees, the judgment of the Collector shall be final, and not open to

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revision or appeal except as hereinafter provided, unless in any such suit a question of right to enhance or otherwise vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land as between parties having conflicting claims thereto, has been *determined by the judgment*, in which case the judgment shall be open to appeal in the manner provided in Sections 160 and 161 of this Act." And then Section 160 says—"In all suits other than those in which, when tried and decided by a Deputy Collector, an appeal is allowed to the Collector, an appeal from the judgment of the Collector or Deputy Collector shall lie to the Zillah Judge, unless the amount or value in dispute exceed 5,000 Rupees, in which case the appeal shall lie in the Sudder Court." Now, in this case, the amount of the arrears of rent is admittedly less than 100 Rupees, and, consequently, unless the suit be one which falls within the exception of the latter part of Section 153, and so is provided for by Section 160, there is no appeal from the judgment of the Deputy Collector to the Judge. Thus it seems that unless a question relating to title to land has in this case been determined by the judgment of the Deputy Collector, the appeal from his judgment did not lie to the Judge, and, consequently, the Judge had no jurisdiction to entertain and decide it. We have therefore to say whether a question of title to land has been determined between the plaintiff and the intervenor by the judgment of the Deputy Collector in this case, bearing in mind the form which that judgment, as we have already described it, substantially assumed.

We have been referred to various decisions more or less remote from this point. One, the earliest of them, was decided by a Full Bench, and is reported in Volume III, Weekly Reporter, Act X Rulings, page 21; and in that case the Court said—"We think that, under Section 77, the only matter enquired into is the fact of the actual receipt and enjoyment of rent before and up to the time of the commencement of the suit; that this fact is totally unconnected with the legal title to, or any interest in, the land, or with the right to receive the rent, which is, by the provision of the Section, reserved for enquiry in the Civil Court; and that, consequently, no appeal lies to the Judge under Sections 153 and 160 of Act X of 1859." This decision seems to be a complete authority for saying that where the Deputy Collector confines himself, as between the plaintiff and the intervenor, to deciding the simple question of the receipt of rent, and its *bona fides*, there can never be an appeal to the Judge. No doubt, it is possible that the Deputy Collector may, in some cases, not very clearly distinguish between the issue which arises, on the intervenor's claim, between the intervenor and the plaintiff, and the issues which arise in the suit between the plaintiff and the original defendant; and it may be that, in consequence of some confusion on this point, the Deputy Collector may make his decision between the plaintiff and the intervenor depend upon a matter of title, instead of upon the simple question of fact, which is prescribed by Section 77, as the sole matter in issue between the plaintiff and the person who is allowed to intervene. If the Deputy Collector does so, it may be that his judgment determines a question of title within the meaning of the latter part of Section 153, Act X of 1859, and so shifts the Court of appeal from the Collector to the Judge. I do not myself desire to express a judicial opinion upon this point now. I have before, namely, in the case reported in Volume V, Wyman's Reporter, page 25, thrown out what was at that time the inclination of my mind with regard to it, and I am willing to go so far as to say, even now, that I have not since seen any reason to change my view. However, the decision which was come to by the Division Bench in that case in no way touches the present matter. The Court was not then called upon to decide whether the Judge had jurisdiction, or not, to entertain the appeal from the Collector, because that point had been already determined in that particular case by a Bench of co-ordinate authority.

We do not think it is necessary for us now to enter into and discuss all the other cases which have been quoted before us to-day. The case reported in Volume IV, Weekly Reporter, page 40, Act X Rulings, is clearly not

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applicable, because the Bench there said—"We cannot gather from the judgment of the Deputy Collector that he has (either rightly or wrongly) determined any question of right to enhance, or otherwise vary the rent of a ryot or tenant, or any question relative to a title to land, or to some interest in land, as between parties having conflicting claims thereto." But the remarks which were thrown out in the sentence which followed the one we have just quoted, afford us some guide as to whether the consideration which the Deputy Collector gave in the present instance to the matters of title put forward by the intervenor, ought to be considered to amount to an enquiry into, or determination of, a question of title. The words to which we allude are these:—"He may have misapprehended the value and character of the documentary evidence before him, but the Act does not include such a circumstance among the contingencies on the happening of which the Collector's decision would cease to be final, and become open to revision." That would seem to justify our saying, here, that the particular view taken by the Deputy Collector of the title put forward by the intervenor, and made use of by him as a guide to his decision on the *bona fides* of the receipt of rent, is not one of the contingencies upon which the Act intended that the Collector's decision should cease to be final. The judgment delivered by the Chief Justice, upon which much stress has been laid by the respondent in this case, and which is reported in Volume III, Wyman's Reporter, Rent Rulings, page 17, affects a decision between the plaintiff and the original ryot defendant. It has no concern with any question which did or might arise between the plaintiff and the intervenor, and the Chief Justice himself makes the remark that Section 77 does not apply to the case. All the remaining cases which were pressed upon our attention are included in, or cited by, the judgment reported in Volume II, Wyman's Reporter, page 65, Act X Rulings, and there the Court, upon a review of them, says, that it considers all these cases to form a class in which the Deputy Collector did not confine his enquiries to the mere fact of the receipt and enjoyment of rent, but entered upon a consideration of, and decided various questions of title.

Now, we have already intimated that the words of the Deputy Collector's judgment lead to us to think that he directed his attention exclusively to the simple question of fact which rightly and properly fell to be decided by him, as between the plaintiff and the intervenor, under Section 77, Act X of 1859, and that he did not travel beyond the issue so raised; and although he in some sense enquired into the matters of title tendered to his notice by the intervenor, he did not decide any question of title between the plaintiff and the intervenor. The words of Section 153 which are relied upon are, when looked into, really very stringent. They do not appear to us, giving them their widest extension, to apply to cases other than those in which the Collector has made the determination of the suit depend *immediately* upon the determination of a question of title. They are these, "unless any question relating to the title to land has been *determined* by the judgment." The Legislature, when using these words, must have contemplated the case where the judgment has determined or affected to determine, as between the parties, a question relating to a title to land, and not merely where the Deputy Collector has collaterally and incidentally, to guiding his mind to a conclusion on the issue which arose under Section 77, thought proper to enquire into and state his opinion as on matters of title between the plaintiff and the intervenor. It seems to us that when he does that, and that only, he cannot be said, in the proper sense of the words of Section 153, to *determine* a question of title between the parties by his judgment. Turning, with this view, to the case which is before us, it is clear to us that the only question which the Deputy Collector proposed to himself to determine, and which he did judicially determine, between the plaintiff and the intervenor, was the simple question of fact, whether, or not, the intervenor had actually and in good faith received the rent of the land before and up to the time of the institution of the suit; and we therefore think that the case does not fall within the latter words of Section 153.

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CIVIL JURISDICTION.
RENT SUITS.

But the respondent further argues that this suit is not merely a suit to recover arrears of rent under Clause 4, Section 23, Act X of 1859, but it is also a suit to eject the ryot defendant for non-payment of arrears under Clause 5 of that Act; and that a suit to eject a ryot under Clause 5, Section 23, does not fall within the provisions of Section 153. No doubt this contention is just as to suits brought under Clause 5, Section 23. It has been more than once held by this Court that when a claim which does not fall within the claims mentioned in Section 153, is joined with a claim which does fall within Section 153, that, in that case, the jurisdiction of appeal is not affected by the provisions of Section 153. However, upon looking at the pleadings in this case, the course which the case has taken, the evidence which has been adduced, and the issues raised, the conclusion that we arrive at is, that although the claim to eject the defendant under the powers provided by Clause 5, Section 23, has been inserted in the plaint, still that claim has never been really matter of contest between the parties. It was never made the subject of an issue in the trial of the cause. There was no contention on the plaintiff's part, during the progress of the suit, that that was a substantial object which he desired to gain. The Deputy Collector, in stating what the suit between the parties was, after having heard both sides and considered all the evidence with very great discrimination, speaks of the suit solely as a suit for arrears of rent. There is no adjudication with regard to the claim to eject, and the decree given by the Deputy Collector is a decree for arrears of rent only. In view of all these facts, we cannot avoid the conclusion that the suit was substantially, to all intents and purposes, a suit for arrears of rent only; and we do not think that the Legislature intended that the mere insertion in the plaint of a nominal claim for ejectment which was never meant to be pressed, which certainly never was mentioned in the Court of first instance, and with regard to which no attempt whatever was made to obtain an adjudication, that the insertion of such a claim in the plaint should have the effect of shifting the jurisdiction of the Court of appeal. We have no case quoted to us which could give us any guidance upon the point. We think that we must be governed by a consideration of the conduct of the parties in the Court of first instance, and the words of the judgment of the Deputy Collector himself in arriving at a conclusion as to the real character of the suit. Upon the whole, we have no doubt that we ought to hold that this suit is in the position of a suit brought simply to recover arrears of rent within Clause 4, Section 23, Act X of 1859, and it is obvious that the amount sought to be recovered is less than 100 Rupees. We have already explained at some length the reasons which make us come to the conclusion that the Deputy Collector did not determine a question of title between the plaintiff and the intervenor within the meaning of Section 153, Act X of 1859. It follows, therefore, that the Judge had no jurisdiction to entertain the appeal, and we consequently can have no jurisdiction either, except for the purpose of determining the jurisdiction. We must therefore reject the appeal; however, in order to do justice between the parties, we think it is necessary for us to exercise that power which is reposed in us by Section XV of the Letters Patent, dated 28th December, 1865, and to direct that the judgment of the lower Appellate Court be quashed. Each party will pay his own costs.

This decision applies to all the appeals above mentioned, therefore all will be dismissed on the same terms. The effect will be that in each of the cases the decision of the Deputy Collector will remain undisturbed.

PART III.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

Reference to the High Court by the Judicial Commissioner of Assam, under Section 434 of the Code of Criminal Procedure, in the cases of

Onooram, on behalf of Mr. Begg, *versus* Lamessa; and Mr. Webster *versus* Keena and others.

1868.

23rd May.

CRIMINAL JURISDICTION.

CRIMINAL RULINGS.

Before *Phear* and *Hobhouse*, J. J.

Offences punishable under Penal Code not affected by the existence of a special law which may cover part of them.

Phear, J.—It is clear from the explanation of the Deputy Commissioner, with respect to the three cases included in this reference, that the evidence before him, in each case, only established the fact of a private injury and trespass. The buffaloes, one or two in number, were caught straying in the tea gardens, and there is no evidence of their behaviour or doings anywhere other than in the gardens themselves. No injury, danger, or annoyance appears, in any way, to have been made out, whether in regard to the enjoyment of property, or the exercise of a public right, on the part of any portion of the community, or of even any particular class of people. It is possible that, if the facts proved before the Deputy Commissioner had been such as to bear out the general representation made by him in his explanation, a public nuisance within the meaning of the Penal Code might have been established. But this is not so, and it is clear that nothing but a private injury in each case is made out by the depositions of the witnesses. It follows that Section 290 of the Indian Penal Code does not apply to any one of the cases. The convictions therefore made by the Deputy Commissioner must be quashed, the fines directed by him to be paid, if they have been paid, must be repaid to the accused, or if the accused or any of them are undergoing the alternative of imprisonment, they must be released.

We may add that this decision is in accordance with one which has been already reported in volume 6 of the Weekly Reporter, page 71. If there was any remedy in the present cases, it might have been sought under the Cattle Trespass Act, No. III of 1859. I think perhaps that it is as well that I should further remark in this case that the Commissioner, in referring the matter to the High Court under the Criminal Procedure Code, has clearly made an error in the report which accompanies his reference to us, namely, in stating that "the fact that there is a special law to meet the offence of cattle trespass completely precluded the Deputy Commissioner from punishing the persons who were the authors of the trespass under the Penal Code."

For instance, if the evidence before the Deputy Commissioner had amounted to showing that the persons accused had turned their cattle in the gardens for the malicious purpose of committing mischief and doing damage to the owners of the gardens, an offence would have been established which could have been rightly punished under the Penal Code, notwithstanding the existence of the special law which meets the offence of cattle trespass.

1868.

30th May.
CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

Queen *versus* Baboo Lall.

Committed by the Magistrate, and tried by the Sessions Judge, of Bhaugulpore on a charge of belonging to a gang of persons associated for the purpose of habitually committing dacoity.

Before *Loch* and *Glover*, J. J.

Where the charges against a prisoner are distinct in their nature, his plea of guilty must be entered on them all, and he should have been convicted, though not necessarily sentenced on all.

Glover, J.—The prisoner in this case pleaded guilty to three of the four charges brought against him, *viz.*, to those under Sections 395, 397, and 400 of the Penal Code.

The Sessions Judge convicted him under Section 400 only, and recorded a verdict of "not guilty" on the other charges.

This appears to be wrong. It has been frequently ruled by this Court, and the rulings are embodied in Circular No. 16, dated 20th August 1864, that when all the facts in evidence form a portion of one entire offence, a verdict should be entered up and sentence passed for that offence only; and though a portion of the same facts would, if they stood alone, constitute a second offence, a verdict of "not guilty" should be entered upon any separate charge for the minor offence. But this, manifestly, has no reference to charges which are essentially different the one from the other, and when the evidence which would suffice to convict a prisoner under Section 395 or 397, would be altogether inadequate to prove him guilty under Section 301, which is an entirely distinct offence.

It appears to me therefore that, on his plea of guilty, the prisoner should have been convicted at least under Section 397 as well as under Section 400. No fresh sentence need have been passed on this conviction.

As the prisoner's appeal has been rejected, it would be useless to direct the Judge to amend the conviction now, but his error should be pointed out to him.

Loch, J.—I concur in the opinion expressed by Mr. Justice Glover. The conviction should have been under Sections 395 and 400, and if the prisoner admitted that, at the time of committing the dacoity, he used a deadly weapon or caused grievous hurt, that fact would render it imperative on the Court to pass sentence of imprisonment for a period of not less than seven years. The offences of dacoity and belonging to a gang of dacoits are separate offences. A verdict on each charge should have been entered up, and the substantial sentence passed on the principal offence.

2nd June.

Reference to the High Court by the Magistrate of Rajshahye, under Section 404, Code of Criminal Procedure, in the case of Nuggurdi Paramanick, accused.

Before *Kemp* and *Glover*, J. J.

Separate sentences passed by a Magistrate for separate offences, but at one time, cannot be lumped together to give an appeal.

In this case, one Nuggurdi Phatuck was charged with being a member of an unlawful assembly, and with criminal trespass, under Sections 143 and 447 of the Penal Code; and whilst the case against him was pending, he brought a counter-charge of criminal trespass against his accused.

Both cases were disposed of on the 29th of February, 1868. The charges under Sections 143 and 447 were held to be proved against Nuggurdi, whilst his counter-charge was dismissed as false, and he was further convicted of bringing a false complaint under Section 211, Penal Code. Nuggurdi was punished in each case with one month's imprisonment, and the question is whether these two sentences are to be taken as forming one and the same sentence, and as such appealable to the Sessions Judge.

The Magistrate, at whose instance this case has been referred to us, under Section 404, Code of Criminal Procedure, holds that as the two convictions

1868.

2nd June.
CRIMINAL JURISDICTION.
CRIMINAL RULINGS.

were of entirely different offences committed on different dates and in different places, the punishments awarded necessarily form separate and distinct sentences, and being each within the limit of one month, were not appealable.

The Sessions Judge, on the other hand, following a precedent of the Agra High Court, holds that the two sentences form together one ground of appeal, and being beyond the limit are appealable to his Court.

The Judge has not referred us to the precedent on which he relies, nor have we been able to find it, but we do find one of this Court, dated the 6th August 1866, II Wyman's Reporter, 43, The Queen *versus* Maly Sheikh, in which the contrary principle is distinctly laid down.

In support of the Judge's ruling, it is contended that the words of Section 46, Code of Criminal Procedure, suppose that any number of different penalties imposed for different offences tried at the same time, make up only one sentence; but there is nothing in the Section to bear out such a construction; on the contrary, the Court convicting a prisoner of several offences is bound to sentence such prisoner to the several penalties prescribed by law, the one penalty commencing after the expiry of the other; and the only limit (under a certain proviso) is the extent of punishment which the particular Court before which the cases are tried is competent to inflict. The object of the Section is to award a specific punishment for each particular offence of which an accused person may be proved guilty, when all the charges against him are tried together, so that in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may be known.

Section 411, Code of Criminal Procedure, lays it down most clearly that in all cases a sentence of one month's imprisonment passed by a Magistrate exercising full powers is not appealable, and if it had been the intention of the Legislature to circumscribe a Magistrate's powers in this respect, and by lumping together two sentences each within the limit, because they happened to be passed at the same time, to make up one whole sentence which would be beyond the limit, and therefore appealable, it would no doubt have said so. The principle laid down by the Judge would be applicable to cases where an accused person has been punished separately for what are really parts of one and the same offence, and not to cases like the present, where the offences are essentially different, and were committed at different times and places.

We think therefore that the Magistrate was right, and that no appeal lay to the Judge. The accused should be recommitted to jail to undergo the remaining portion of his sentence.

PART V.

SMALL CAUSE COURT AND OTHER REFERENCES.

Reference to the High Court from the Judge of the Court of Small Causes at Hooghly and Serampore.

1868.

9th May.
SMALL CAUSE COURT AND OTHER REFERENCES.

G. A. Depenning, (Judgment-debtor) *Petitioner, versus* Debendro Nauth Moitro (Decree-holder) *Opposite Party.*

Before *Peacock*, C. J., and *Dwarka Nauth Mitter*, J.

A defendant proceeding in person to a Small Cause Court is not protected from arrest in immediate execution of the judgment which may then be given against him.

Case.—The first question put was whether the express provision of ion 19, Act XI of 1865, that immediate execution can issue against a ndant in a Small Cause Court overrides the usual rule that a party called to e in evidence in a Civil Court is protected from arrest *eundo, morando, et leundo.* The second question was whether, if he was so protected, the intiff ought not to be made to refund sums paid under such an illegal arrest in this case had taken place.

Judgment of the High Court.—We are of opinion that when, by Section of Act XI of 1865, a Small Cause Court passing a decree was authorized to order immediate execution by the issue of a warrant, either against the person or against the moveable property of the judgment debtor, it was not intended that the debtor should be protected from arrest under the warrant until after he had a reasonable time for returning to his home. In other words, the Legislature never intended, when it authorized immediate execution, to give the judgment debtor a fair chance of getting away.

With regard to the 2nd question, it appears to us that it would be very unreasonable after the plaintiff had obtained a decree against the defendant, and the defendant had paid the amount, to compel the plaintiff to return it to him merely because he was arrested before he reached home under an execution issued against his person by the Court, and paid the amount decreed against him in order to obtain his discharge. It appears to us that to order such a refund would be very much like trifling with the administration of justice.

JUNE 1868.

E. T. TREVOR, ESQ., AND A. MONEY, ESQ., C.B.

No. 9.

PART I.—A1, A2, C, D, E1, E2, E3, E4, E5, E6.
PART II.—B6, Part II; B7, Part II; B8, Part II; B9, col. 2; B10, Part II.
PART III.—D1, D2, D3, E1, E2, F, G.
PART IV.—A.

Government Resolution, dated 14th May 1868, is circulated herewith for information and guidance of Divisional and District Officers, whose special attention is called to the concluding directions in the Resolution. Two sets of forms of the returns, enumerated in the margin, have been forwarded by post to each Officer.

2. District Officers should at once report, to the Commissioner of the Division, the establishment which they consider absolutely necessary for the preparation of the returns. The Board are of opinion that a single additional Clerk in the English branch of some offices will be sufficient, whilst in many no extra help should be required. Commissioners are requested to submit to the Board a general statement shewing the additional staff required in each of the Districts of their Division, and in their own Office, for this special work, by the 31*st July*, 1868, *at latest*.

3. The returns for 1867-68 should be put in hand at once, and a careful report should be submitted by each District Officer on the best mode of preparing these returns for future years.

(*RESOLUTION.*)

STATISTICS.

Fort William, the 14*th May*, 1868.

READ again the following correspondence:—

Letter No. 452, dated the 31st October 1866, from the Government of India, in the Home Department, with a Report by the Statistical Committee, dated the 8th August preceding, requesting that an attempt may be made to collect the information embraced by the revised forms which have been drawn up by the Committee, if it shall appear to this Government feasible at once to instruct its officers to set on foot the system of returns and of record, necessary to give effect to the views of the Committee.

Circulars of the 29th November 1866, calling on the Heads of the Several Departments under this Government to report on the extent to which the information embraced by the proposed Forms can be annually furnished by them, with a view to incorporation in the Administration Reports submitted to this Government.

The replies of the Heads of Departments to those Circulars.

Letter No. 4143, dated the 16th November, 1867, to the Government of India, in the Home Department, suggesting that each Department be called upon to furnish, at the end of the official year 1867-68, in the new Forms, such information as can be collected from the forms now in use, and such as can readily be supplied by local officers with their present means, and that, from the commencement of the year 1868-69, arrangements might be made for collecting and furnishing information on some further points, thus making gradual progress towards a complete set of forms, as contemplated by the Statistical Committee in paragraph 4 of their letter of the 8th August.

Read for the first time the Resolution of the Government of India, in the Financial Department, No. 995, dated the 29th February 1868, on those suggestions.

Upon a full review of the whole of the correspondence, the Lieutenant-Governor has resolved to order that the first 16 paragraphs of the Statistical

1868.

June.
REVENUE CIRCULARS.
(Continued.)

Committee's letter of the 8th August shall be incorporated in this Resolution, and that the attention of every Officer under this Government, who may be called upon to assist in filling in the Statistical Tables, shall be directed to a careful study of the principles laid down therein, in order that they may be duly impressed with the importance of using their best exertions to secure completeness and accuracy in their preparation. The Committee write as follows:—

The Committee now beg to re-submit the Forms prepared for the Administration Reports, which have been partially amended in their details, partly in accordance with some of the suggestions of the Local Governments, and partly in respect to points which have occurred to the Committee on once more examining the whole of the Forms.

2. Before noticing particulars of the various objections and remarks of the local authorities, contained in the abstract received from the Government of India, the Committee would observe that a great part of the objections are founded on some misapprehension of the scheme and object of the Returns, and they hope that they may meet many of these objections by the following general explanations.

3. Such objections may be classed as follows:—

I.—That more is required than can be given for all provinces and districts.

II.—That some details, thought desirable by the Heads of local Departments, are omitted.

III.—That much of the information required cannot be obtained annually, although it might be procured once in five or ten years, or at the time of settlement.

IV.—That the frequent preparation of some of the Returns would be inquisitorial, expensive, and would lead to extortion and to fear of fresh taxation, &c.

V.—That careless Officers might mislead by inaccurate Returns.

4. In reply the Committee submit—

Objection I.—That more is required than can be given for all provinces and districts.

That they have never contemplated, or expected, that the whole of the Returns should be filled in and rendered complete at once. They only propose the Forms as exhibiting a sort of skeleton model, to which attention should be directed, and towards which the statistics of each province should be gradually worked up, as circumstances permit. They do not suppose that the whole of the Returns can yet be perfectly or fully rendered from any one province. They would only suggest that all the information available in each province should be put into a uniform shape in the prescribed Forms; and that any additional information which can, from time to time, by unobjectionable means, be obtained towards filling the Forms, should, from year to year, be added. If any Return cannot be made complete for the whole of any province, it might, nevertheless, be rendered for any part thereof. If, then, any Return can be, in whole or part, filled up for the whole or part of any province, or for any single district, so much is gained.

5. The Committee are glad to observe that no one of their Forms is concurrently condemned by all the local authorities as neither now practicable nor, likely to be so. If some Returns are declared to be in Bengal Proper not practicable, without an entirely new machinery, the heads of other provinces say—"This information may be procured at the time of settlement," or make such like remarks. There does not, then, seem to be in the objections, ground for wholly expunging any of the Forms. It may even be said that the submission of some Returns or columns blank, for those provinces which cannot fill them, will be useful as exhibiting and calling attention to existing deficiencies.

Objection II.—That some details, thought desirable by the Heads of local Departments, are omitted.

6. The objections under this head are comparatively few. In some instances they have been met by small additions to the Committee's Forms. But the Committee would meet such general remarks as that marginally quoted, of the Madras Board of Revenue, on the Agricultural Forms,* by referring to paragraph 31 of their first Report, and by explaining that they do not, for one moment, propose to interfere with the Returns of local Departments to the local Governments. All the additional particulars required for local and departmental purposes will be matter of local and departmental arrangement, although they need not be included in the more Abstract Returns submitted to the Government of India. The local Departments should, as far as possible, give the information required for the latter purpose; they may add as much more as they deem proper for the information of their own Governments.

* These Forms omit some minor details for which the Forms now in use in the Revenue Department provide, and which the Board consider it desirable to retain in their departmental returns to the local Government.

Objection III.—That much of the information required cannot be obtained annually, although it might be procured once in five or ten years, or at the time of settlement.

7. It is not the suggestion† of the Committee that any of the Returns, excepting those which on the face of them, refer to the particular year, and those which are prepared from general information readily available, should be of a proper annual character. The Legislative, Judicial, Prison, Police, Military, and Marine Returns are in their character annual, as are those relating to Finance, Public Works, Railways, Trade, Coinage and Currency, Education, and some of the statistics of life.

† See paragraph 22 of their first Report.

8. The Political Returns, the Civil Divisions of British territory, the Survey and Settlement Returns included under the fiscal head, the Current Prices of produce and labor, the

charitable, Ecclesiastical, and Literary Returns, may probably be annually rectified and rendered more and more complete from year to year. But the Returns of physical geography and population, much of the fiscal statistics, and the Returns of agriculture and stock, mines and manufactures, must be from their nature occasional. The Committee at one time contemplated making such Returns quinquennial or decennial; but, on consideration, it appeared to them that it would probably be impossible, under present circumstances, to prescribe that such Returns should be compiled for all India at any fixed periods whatever; and that the attempt to prescribe any such arrangement would be to interfere with that entire discretion of the local authorities which they would leave, for the present, quite unembarrassed. On the other hand, to print such Returns only occasionally, in the particular year for which they are procured for any province, would render every set of Returns incomplete; and the Committee think it best that every such Return, once prepared, should be annually reprinted (with such corrections and emendations as may be possible,) till it is superseded by more recent information,—the date of the original surveys, on which the Returns are based, being always stated; thus the principal object of the Administration Reports will be secured,—that of presenting to Parliament and the public a picture of the whole condition and administration of India every year, as complete in itself as is possible.

Objection IV.—That the frequent preparation of some of the Returns would be inquisitorial, expensive, and would lead to extortion and to fear of fresh taxation, &c.

9. The remarks of the Committee, in reference to the previous heads of objection, for the most part, meet this also. When it is understood that it is not proposed to require the preparation of any Returns other than those which the local Governments find it practicable, safe, and convenient to procure,—and that information of such a character that it cannot be annually prepared is not expected to be collected more frequently than is deemed expedient,—all objections on the score of expense, inconvenience, and political disquietude become matters for the consideration of the local Governments. On all these points the Committee would repeat that they do not, for a moment, suggest that statistical objects should clash with those which involve the peace and well-being of the country, and with which the administrative authorities alone can deal. They only hope that their Returns may be filled up to such an extent, and renewed so often, as, on mature consideration, may be found possible and expedient.

Objection V.—That careless Officers might mislead by inaccurate Returns.

10. This objection also the Committee consider to be within the province of the local Administrations, which will best judge whether particular Returns are such that they can be beneficially published. At the same time Statistical Returns, whether accurate or tolerably approximate to correctness, are in many ways so valuable, that they trust endeavour will be made to impress on District and Superintending Officers, the importance of the duty, and the degree to which a little care and method may render valuable Returns, which otherwise prepared are useless. The Committee do not doubt that, with the aid and the Establishments possessed by District Officers in most parts of the country—if those Officers are but sufficiently impressed with the importance of the matter—the method of rendering the Returns will greatly improve by practice, and many valuable facts will be collected. The Committee would, in fact, deprecate excess of caution on this view of the subject. Everything must have a beginning; the rudest statistics, if honestly rendered, are better than no statistics; and the mere fact of publication and comparison will bring to light errors and blots which, in the darkness of local Offices, would never have been discovered. The Committee anticipate that the first Returns will contain errors; but if a uniform set of Forms be definitely adopted, these errors will, doubtless, decrease in each succeeding Return. Meantime, it is part of their proposal that the local Governments should distinguish the Returns as accurate, approximately accurate, or mere rough estimates, so that the world may not be misled by mistaking the character of the statistics.

11. The Committee append to this Report a note on those objections and suggestions of the local Governments, which are not met by their *general* remarks, omitting more particular notice of those to which the *observations* already made by them, apply.

12. With the reservations, then, and cautions above noted, the Committee, in reply to the last paragraph of the letter of the Government of India, venture to recommend the following course.

13. That the local Administrations should be requested to adapt the statistics already possessed by them, or available to them, to the Forms prescribed for uniform use; and to fill up those Forms each year, as far as possible, (either in part or in whole, and whether for a part or the whole of their territories,) and embody them in the annual Administration Reports, distinguishing accurate from approximate figures, and Returns prepared for the current year, from those based on figures of an earlier date, by mentioning the date to which the statistics refer in all cases.

14. That they should further be requested to submit to the Government of India Statements showing those additional Forms of the prescribed list, which may be filled up, either immediately, or at some not very distant period, by a small re-arrangement of machinery at small expense, and without political danger or serious inconvenience; and to explain how far they propose to take measures to this end.

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(Continued.)

15. That each Administration should submit a further list of the Forms of the prescribed series, which it is not considered possible to fill up within any reasonable time, without extensive new machinery, great expense, or political inconvenience; and that they should state whether they consider any of these statistics so important, as to justify the Government in undertaking their preparation.

16. The Government of India would then be in a position, on a comparison of the various Reports of the local Governments and Administrations, to come to a positive conclusion, as to the extent to which a system of Statistical Returns can be definitely prescribed and required from all provinces. Information which can be supplied from most provinces, and is wanting in but few, might then, perhaps, be deemed worth collecting in the remaining few, at a cost which would be justified by the imperial and general importance of the whole.

Whilst bearing in mind the principles enunciated by the Committee, the Lieutenant-Governor directs the observance for the present, and in the preparation of the new tables for the past year 1867-68, of the following Rules, which must be considered as tentative towards a more extended scheme.

(*a*).—All Heads of Departments are to fill up and supply the detailed tables proposed by the Committee, *only* so far as the entries can be compiled from the materials which have been collected for the more concise tables which have been hitherto supplied with the Administration Reports or Annual Reports of each Department. No information which is not already in the Offices is to be sought for.

(*b*)—They are to throw into the shape required by the new Statistical Tables, all such items, and the entries in such columns as can be *reliably* compiled from the Registers and details which have already been kept up, and only these.

(*c*).—These tables must be made subordinate to the tables furnished with the regular reports, and no attempt must be made to hurry on their submission with the regular reports. The Annual Returns and Reports should be submitted for the year 1867-68 as usual, and the new tables may follow.

(*d*).—When sending in these partially filled tables, all Heads of Departments should submit well-considered suggestions as to any slight changes and additions which, in their opinion, may be introduced in the Registers from the beginning of 1869-70, which would have the effect of enabling them, at the end of the year, to increase the number of entries for that year in the new tables.

As the preparation of these tables will involve extra labor, the Heads of Departments are desired to consider and report what small establishments will be required, if any, in their own and subordinate Offices to carry out the work, and to state what will be the probable cost of such establishments.

ORDERED, that separate letters be addressed to the High Court and the Justices of the Peace for the Town of Calcutta, forwarding the necessary tables, with a request that the Hon'ble Court and the Justices will favor the Lieutenant-Governor with the information required.

ORDERED, also, that a copy of this Resolution, together with the necessary tables, be forwarded to the Heads of Departments with a request, that they will be so good as to submit the required information.

No. 10.

The following is to be substituted for Clause 4A, at page 202 of the Board's Rules:

"Save under the preceding rule, no remittances should be made, either in Cash or Postage Stamps, on account of Peon's Fees and Postage, when processes issued by a District or Sub-Divisional Court are forwarded for service through the Court of another District or Sub-Division. It will be sufficiens in such cases for the Court which issues the process to pay the necessary feet

into the Treasury of its own District, and in applying for the service of the process, to certify that the payment has been made; such certificate being accepted as proof of payment by the Court addressed, and service of the process being ordered accordingly."

No. 11.

The following should be substituted for the Register prescribed in Circular No. 8 of May last, at page 218 of the Board's Rules:—

"Register (N.) of payment of stamp duty and penalty.

1, Serial number. 2, Date of entry. 3, Date and description of document. 4, Amount received, sub divided into (a) Duty, (b) Penalty, (c) Total. 5, Name and residence of party from whom received. 6, Number and title of suit. 7, Remarks."

No. 12.

The Board having reason to believe that letters received, as well as those issued, are in some instances included in the Quarterly Return No. VII, against the heading "Letters written and answered," desire that, in future, only letters issued from the Revenue Department of the Commissioner's Office shall be entered against this head. Reminders and mere formal letters need not be included in the number.

A revised form of return will be supplied to Commissioners from the Stationery Office.

No. 13.

Add as Clause 13, Section XIV, page 74 of the Board's Rules:—

"13..... Whenever a despatch of Opium in transit is handed over from one official's charge to that of another, its gross weight should be ascertained and recorded."

No. 14.

The following should be added to the Registers prescribed in Chapter XIV, Section I, Rule 4, page 214 of the Board's Rules:—

"Nos. 75, 76, and 85 to 87."

No. 15.

As the immediate carrying out of the orders conveyed in the Board's Circular No. 6 for May, 1868, might in some cases entail hardship on proprietors of estates, the Board desire that the strict execution of the directions in the Circular referred to should be deferred until May, 1869. Collectors are authorized, in the interval, to receive, as hitherto, applications for sale of Putnees from zemindars who have previous to date made similar applications for sale of Putnees in the same zemindaree, such applications having been entertained, and who shall have applied to the Collector for registry of their names in the Mutation Register before applying for sale of the Putnee.